262 N.C. App.—No. 3 Pages 376-510

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 1, 2020

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

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ROBERT N. HUNTER, JR.[10]

[1]Sworn in 30 April 2019. [2]Sworn in 26 April 2019. [3]Died 28 August 2015. [4]Died 3 May 2015. [5]Died 30 January 2017. [6]Died 4 January 2015. [7]Died 27 January 2015. [8]Died 11 September 2015. [9]Resigned 24 March 2019. [10]Retired 1 April 2019.

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COURT OF APPEALS

CASES REPORTED

FILED 20 NOVEMBER 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

APPEAL AND ERROR—Continued

Notice of appeal—timeliness—jurisdictional violation—Plaintiff's failure to establish in the appellate record that his notice of appeal was timely filed with the Industrial Commission was a jurisdictional violation of the Appellate Rules and required dismissal. **Bradley v. Cumberland Cty., 376.**

Record on appeal—district court judgment—notice of appeal to superior court—petition for writ of certiorari—The Court of Appeals treated defendant's appeal from the superior court's judgment of driving while impaired (DWI) as a petition for writ of certiorari—and granted said petition—where the record did not contain the district court's DWI judgment or the notice of appeal to the superior court and thus failed to establish that the superior court had jurisdiction. **State v. Myers McNeil, 497.**

Waiver—not raised below—temporary custody review—due process argument—In a custody case, defendant mother's argument that the trial court violated her due process rights by conducting a temporary custody review in the judge's chambers and not in open court were waived and dismissed where defendant's counsel did not object to the review being held in chambers, the trial court did not alter the custody arrangement already in place, and defendant did not raise the procedural due process issue in her Rule 59 and 60 motions to set aside the permanent custody order. **Routten v. Routten, 436.**

CHILD CUSTODY AND SUPPORT

Evidence—domestic violence—consideration by trial court—The Court of Appeals rejected defendant mother's contention that the trial court failed to consider evidence of domestic violence perpetrated by plaintiff father before making its custody determination, where the trial court made findings regarding altercations between the parties and those findings were supported by competent evidence. **Routten v. Routten, 436.**

Findings of fact—sufficiency of evidence—In a custody case, the trial court's numerous findings of fact were based on competent evidence consisting of testimony from both parties, neighbors, and medical professionals. **Routten v. Routten, 436.**

Pro se motions—amended by counsel—original motions voluntarily dismissed—In a custody case, the Court of Appeals rejected defendant mother's argument that the trial court should have considered her pro se Rule 59 and 60 motions rather than the amended motions subsequently filed by her attorney, where defendant's own counsel took voluntary dismissal of the pro se motions and defendant did not voice any disagreement for that action, nor did she advance any authority for her arguments on appeal. **Routten v. Routten, 436.**

CHILD VISITATION

Electronic—telephone calls—supplement to visitation—In a custody case remanded for other reasons, the Court of Appeals instructed the trial court that if it allowed defendant mother to have visitation with her children, electronic visitation in the form of telephone calls or other electronic contact may be ordered only as a supplement, not as a replacement, to defendant's visitation rights. **Routten v. Routten, 436.**

by initiating a presentment. To the extent that concurrent jurisdiction exists, the first court to exercise jurisdiction obtains jurisdiction to the exclusion of the other. Here, there was no evidence that the district court exercised its jurisdiction after concurrent jurisdiction existed, and the State made clear its intent to abandon the district court action. This served as the functional equivalent of a dismissal. **State v. Cole, 466.**

Speeding to elude arrest—property damage exceeding $1,000—sufficiency of evidence—In a prosecution for speeding to elude arrest, there was sufficient evidence to support the essential element of property damage exceeding $1,000 where defendant drove through a house as he wrecked the car. N.C.G.S. § 20-141.5 does not specifically define how to determine the value of the "property damage"; it could be either the cost to repair the damage or the decrease in the value of the damaged property as a whole. Although a police officer did not testify as an expert, the jury could bring to the question their common sense and their knowledge gained from their experiences of everyday life. **State v. Gorham, 483.**

SEARCH AND SEIZURE

Fruit of the poisonous tree—traffic stop—roadside breath test—subsequent intoxilyzer test—There was no plain error in a prosecution for driving while impaired (DWI) where the trial court admitted evidence discovered after an allegedly unlawfully compelled roadside breath test. The trial court did not address whether subsequent evidence was obtained as a result of the roadside test, but held the initial stop was justified by defendant's license plate not being illuminated. The superior court's findings were sufficient to justify the initial traffic stop and supported a conclusion that the officer had probable cause to arrest defendant for DWI, which justified the later intoxilyzer test. **State v. Cole, 466.**

Traffic stop—extension—ordinary inquiries incident to stop—A traffic stop of defendant was not unlawfully extended where an officer was investigating whether defendant's vehicle was being operated without a valid license, made ordinary inquiries incident to the traffic stop, and acquired reasonable suspicion that defendant was operating the vehicle while impaired. **State v. Myers McNeil, 497.**

TERMINATION OF PARENTAL RIGHTS

No-merit brief—Rule 3.1(d)—independent review—Where a mother's parental rights were terminated on the grounds of neglect and dependency, her attorney filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d), and the mother did not file a separate brief, the Court of Appeals elected to conduct an independent review of the record in its discretion and concluded that any arguments the mother might advance on appeal were frivolous. **In re I.B., 402.**

No-merit brief—Rule 3.1(d)—independent review—not required—The Court of Appeals reaffirmed its holding that Rule of Appellate Procedure 3.1(d) does not require the appellate court to conduct an independent review of the record in termination of parental rights cases in which the parent's attorney has filed a no-merit brief and the parent has not filed a separate brief. The clear and unambiguous text of Rule 3.1(d) does not require such review, and the exclusion of such language must be presumed to be purposeful. **In re I.B., 402.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

JAMES A. BRADLEY, EMPLOYEE, PLAINTIFF
v.
CUMBERLAND COUNTY, EMPLOYER, SELF-INSURED
(KEY RISK MANAGEMENT SERVICES, INC., SERVICING AGENT), DEFENDANTS

No. COA18-334

Filed 20 November 2018

1. Appeal and Error—notice of appeal—service—by email—non-jurisdictional violation

Where plaintiff improperly served opposing counsel his notice of appeal from the Industrial Commission's Opinion and Award by email, the violation of the Appellate Rules was non-jurisdictional and did not warrant dismissal where all parties had actual notice, as evidenced by defendants' participation in the appeal.

2. Appeal and Error—notice of appeal—service—certificate of service in record—non-jurisdictional violation

Plaintiff's failure to include in the record a certificate of service of his notice of appeal from the Industrial Commission's Opinion and Award was a non-jurisdictional violation of the Appellate Rules and did not necessitate dismissal.

3. Appeal and Error—notice of appeal—designation of court to which appeal is taken—non-jurisdictional violation

Plaintiff's failure to designate the court to which he was appealing the Industrial Commission's Opinion and Award in his notice of appeal was a non-jurisdictional violation of the Appellate Rules and did not warrant dismissal of plaintiff's appeal where plaintiff's only appeal of right was in the Court of Appeals and defendants participated in the appeal.

4. Appeal and Error—notice of appeal—timeliness—jurisdictional violation

Plaintiff's failure to establish in the appellate record that his notice of appeal was timely filed with the Industrial Commission was a jurisdictional violation of the Appellate Rules and required dismissal.

Appeal by plaintiff from Opinion and Award entered 7 November 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2018.

Musselwhite, Musselwhite, Branch and Grantham, by Stephen C. McIntyre, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, LLP, by Dayle A. Flammia and Lindsay A. Underwood, for defendants-appellees.

ZACHARY, Judge.

Plaintiff James A. Bradley appeals from an Opinion and Award of the North Carolina Industrial Commission. In that Plaintiff failed to establish that his notice of appeal was properly and timely filed, this Court lacks jurisdiction. Accordingly, we dismiss Plaintiff's appeal.

I. Background

On 28 March 2017, Deputy Commissioner Lori A. Gaines issued an Opinion and Award concluding Plaintiff was entitled to workers' compensation benefits and awarding Plaintiff disability benefits. Defendants appealed to the Full Commission, and on 7 November 2017, the Full Commission entered an Opinion and Award reversing in part and affirming in part the Deputy Commissioner's Opinion and Award.

Plaintiff filed his notice of appeal to this Court. Plaintiff's counsel printed the notice of appeal on his firm's letterhead and addressed the notice to Commissioner Phillip A. Baddour, III of the Industrial Commission, confirmation receipt requested. Although the notice indicated that it was filed with the Industrial Commission "via Electronic Filing Portal," it lacked any time stamp indicating if or when the Industrial Commission received Plaintiff's notice of appeal. At the bottom of the notice was a notation of "cc via email: Dayle Flammia, Counsel for Defendants," indicating that opposing counsel was to receive a copy of the notice of appeal via email. Further, Plaintiff failed to include a certificate of service in the record on appeal demonstrating how and when Plaintiff served opposing counsel with a copy of the notice of appeal. Finally, the body of the notice failed to state the court to which appeal was being taken.

II. Appellate Jurisdiction

This Court has the power to inquire into jurisdiction at any time, even *sua sponte*. *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 98, 693 S.E.2d 684, 687 (2010). We must have jurisdiction to hear the cases before us, and our power to hear those cases must be "properly invoked by an interested party." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*,

362 N.C. 191, 197, 657 S.E.2d 361, 364 (2008). Both statute and our Rules of Appellate Procedure provide the proper method by which interested parties may successfully invoke our jurisdiction. *Id.* at 197, 657 S.E.2d at 364-65 ("The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case."). When an appealing party fails to follow the steps necessary to vest this Court with jurisdiction, we cannot review the case on the merits, and the appeal must be dismissed. *Id.* at 197, 657 S.E.2d at 364.

Generally, violations of Rule 3 are jurisdictional and warrant dismissal of an appeal. *Id.* at 197, 657 S.E.2d at 365 (citing *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)). However, certain violations of the appellate rules are non-jurisdictional and do not invariably warrant dismissal of an appeal. *Id.* at 200, 657 S.E.2d at 366-67. Non-jurisdictional rules are those that are "designed primarily to keep the appellate process flowing in an orderly manner." *Id.* at 198, 657 S.E.2d at 365 (citation and quotation marks omitted). The violation of non-jurisdictional rules warrants dismissal only when the violation or violations amount to a "substantial failure or gross violation" of the Appellate Rules that impairs this Court's task of review or frustrates the adversarial process. *Id.* at 200, 657 S.E.2d at 366.

A. Appealing Cases from the Industrial Commission

The Workers' Compensation Act provides a right to appeal Industrial Commission cases to this Court:

> [E]ither party to the dispute may, within 30 days from the date of the award or within 30 days after receipt of notice to be sent by any class of U.S. mail that is fully prepaid or electronic mail of the award, but not thereafter, appeal from the decision of the Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure.

N.C. Gen. Stat. § 97-86 (2017). The Industrial Commission requires that parties submit most documents in workers' compensation cases electronically via the Commission's Electronic Document Filing Portal ("EDFP"). 11 NCAC 23A.0108(a). Parties can file a notice of appeal to the Court of Appeals via EDFP or U.S. Mail. 11 NCAC 23A.0108(g).

Article IV of the Appellate Rules governs appeals from administrative tribunals, including the Industrial Commission. Pursuant to Rule 18, "[a]ppeals of right from administrative [tribunals] shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial division, except as provided in this Article." N.C.R. App. P. 18(a). A party's notice of appeal from the Industrial Commission must (1) specify the party or parties taking the appeal; (2) designate the final decision from which appeal is taken and the court to which appeal is taken; and (3) shall be signed by counsel of record for the party or parties taking the appeal. N.C.R. App. P. 18(b)(2). Appellants can demonstrate timely filing of a notice of appeal by including in the appellate record some form of acknowledgement from the Industrial Commission stating when the Commission received the notice of appeal. *See Jones v. Yates Motor Co.*, 121 N.C. App. 84, 85, 464 S.E.2d 479, 480 (1995) ("On 23 March 1994, the Commission advised plaintiff that it received his notice of appeal to the Court of Appeals."). Such acknowledgement includes, *inter alia*, providing a time-stamped copy of a notice of appeal or a letter from the Industrial Commission acknowledging receipt of a notice of appeal. Article IV of the Appellate Rules does not, however, provide any instruction concerning service of the notice of appeal upon the opposing party.

B. Service of a Notice of Appeal

"Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, *at or before the time of filing*, be served on all other parties to the appeal." N.C.R. App. P. 26(b) (emphasis added). Rule 26 further prescribes the following manner of service:

> Service may be made in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure and may be so made upon a party or upon its attorney of record. Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, or, for those having access to such services, upon

> deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the [appellate courts'] electronic-filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es), or service may be accomplished in the manner described previously in this subsection.

N.C.R. App. P. 26(c). Rule 4 of the North Carolina Rules of Civil Procedure substantially mirrors the methods of service and process listed in Rule 26(c) of the Appellate Rules, with a few additional methods provided. *See e.g.*, N.C. Gen. Stat. § 1A-1, Rules 4(j)(1), (j1) (2017) (permitting, among other methods, service by leaving copies at a party's dwelling with a person of suitable age, service by delivery to a party's authorized agent, or service by publication).

Generally, service by email is not allowed. *See id.* § 1A-1, Rule 4(j6) ("Nothing in subsection (j) of this section authorizes the use of electronic mailing for service on the party to be served."). However, parties can serve papers by email in one limited instance: for documents filed electronically to the North Carolina Appellate Courts' electronic-filing site. *See* N.C.R. App. P. 26(c) ("When a document is filed electronically to the electronic-filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es) . . . ."). A notice of appeal is not filed with this Court, but rather with the court that entered judgment. *See* N.C.R. App. P. 3(a), 26(a). Thus, appellants cannot serve a notice of appeal via email. *See MNC Holdings, LLC v. Town of Matthews*, 223 N.C. App. 442, 445-47, 735 S.E.2d 364, 366-67 (2012) (holding service of a notice of appeal by email is a technical violation of Rule 26 of the Appellate Rules, but determining that the technical error did not warrant dismissal where all parties clearly received notice and the error did not materially impede review). In addition, both the Rules of Civil Procedure and the Rules of Appellate Procedure require proof of service in the form of a certificate of service. *See* N.C. Gen. Stat. § 1A-1, Rule 5(b1); N.C.R. App. P. 26(d).

III. Discussion

[1] In the instant case, the following errors are apparent: (1) Plaintiff's notice of appeal was improperly served via email; (2) the record on appeal does not include a certificate of service of the notice of appeal; (3) the notice of appeal failed to designate the court to which appeal was being taken; and most significantly, (4) the record on appeal contains no proof that the notice of appeal was timely filed.

The first three of Plaintiff's errors constitute non-jurisdictional violations of our Appellate Rules. Plaintiff improperly served opposing counsel with his notice of appeal by email, failed to include a certificate of service of his notice of appeal, and failed to designate the court to which appeal was taken. Neither Rule 4 of the Rules of Civil Procedure nor the Appellate Rules permit service of a notice of appeal by email. Thus, Plaintiff's service of the notice of appeal was improper. However, this Court has ruled that such a violation is non-jurisdictional and does not warrant dismissal where all parties had actual notice. *See State v. Williams*, 235 N.C. App. 201, 204, 761 S.E.2d 662, 664 (2014) (holding that service of a notice of appeal is a non-jurisdictional violation and determining that dismissal would be inappropriate because the State was not misled by the error and waived compliance by participating in the appeal), *appeal dismissed and disc. rev. denied*, 368 N.C. 241, 768 S.E.2d 857 (2015). Here, it is clear that Defendants had actual notice of appeal to this Court by their participation in the appeal. Accordingly, this violation does not warrant dismissal of the appeal.

[2] Second, Plaintiff failed to include a certificate of service of the notice of appeal in the record. Appellate Rule 3 provides that service of a notice of appeal shall be as provided in Rule 26. N.C.R. App. P. 3(e). Rule 26 requires that the certificate of service "shall appear on or be affixed to the" notice of appeal. N.C.R. App. P. 26(d). Therefore, Plaintiff's failure to include a certificate of service of his notice of appeal violates Appellate Rule 3. However, while proper filing of a notice of appeal is jurisdictional, the manner of service of a notice of appeal is a non-jurisdictional requirement. *See Lee*, 204 N.C. App. at 102, 693 S.E.2d at 689-90 (holding that "where a notice of appeal is properly and timely filed, but not served upon *all* parties" the "violation of Rule 3 is a non-jurisdictional defect[,]" although it is nevertheless a "significant and fundamental violation" warranting dismissal of the appeal). In that this violation does not constitute a "substantial or gross violation of the Appellate Rules," it does not necessitate dismissal.

[3] In addition, Plaintiff neglected to designate in the notice of appeal the court to which the case was being appealed. This Court, however, has deemed that a violation of this sort does not necessarily warrant dismissal of the appeal. *See Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (holding that the appellant's failure to designate the court to which the appeal is taken is not a fatal error, so long as this information may be fairly inferred and the other parties are not misled by the mistake). Plaintiff's only appeal of right lies in this Court, so it can be inferred that Plaintiff intended to appeal to this

Court despite his failure to designate in his notice of appeal the court to which he was appealing. Based on Defendants' participation in this appeal by settling the record on appeal and filing a brief, it is clear they were not misled by this Rule violation. As a result, this violation, alone, would not warrant dismissal of Plaintiff's appeal.

[4] Finally, there is no indication that Plaintiff's notice of appeal was timely filed, which is a jurisdictional error. *E.g.*, *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 268 (2007) (dismissing the defendant's cross-appeal from a decision of the Industrial Commission because the notice of appeal was not timely filed), *disc. rev. denied*, 362 N.C. 513, 668 S.E.2d 783 (2008). Plaintiff's counsel allegedly filed his notice of appeal—on his firm's letterhead—via the Industrial Commission's Electronic Document Filing Portal. The notice of appeal does not bear a time stamp, file stamp, or any other designation that the Industrial Commission received the notice of appeal. Plaintiff's counsel requested that Commissioner Baddour confirm receipt of the notice; however, Plaintiff failed to include any acknowledgment from the Industrial Commission indicating receipt of Plaintiff's notice of appeal in the record on appeal. The notice of appeal is dated "December 5, 2017," which would have been timely, but that date was affixed by Plaintiff's counsel, and again, not confirmed by proof of service. We will not assume the notice of appeal was timely filed solely based upon Plaintiff's unverified notice of appeal. *See Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365 (citing *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 408 (1991) (per curiam) (holding that because of the failure to include the notice of appeal in the record, in violation of Rule 3, the Court of Appeals had no jurisdiction and the appeal must be dismissed); *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988) (holding that the State violated Rule 3 by failing to give timely notice of appeal, resulting in a lack of jurisdiction)).

"[I]t is [the appellant's] burden to produce a record establishing the jurisdiction of the court from which appeal is taken, and his failure to do so subjects th[e] appeal to dismissal." *State v. Phillips*, 149 N.C. App. 310, 313-14, 560 S.E.2d 852, 855, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002). Subject matter jurisdiction cannot be waived by this Court or the parties, *Inspection Station No. 31327 v. N.C. Div. of Motor Vehicles*, 244 N.C. App. 416, 428, 781 S.E.2d 79, 88 (2015), and because such violation of Rule 3 is jurisdictional, plaintiff's appeal must be dismissed.

IV. Conclusion

There is no indication in the record that Plaintiff properly and timely filed his notice of appeal. As a result, this Court does not have jurisdiction to hear Plaintiff's appeal, and the appeal is therefore dismissed.

APPEAL DISMISSED.

Judges STROUD and MURPHY concur.

CUMBERLAND COUNTY, EX REL. LLOYD E. MITCHELL, SR., PLAINTIFF
v.
DANITA L. MANNING, DEFENDANT

No. COA17-662

Filed 20 November 2018

1. Contempt—civil—child support order—order still in force

In a civil contempt proceeding based on a mother's failure to pay child support arrears, the trial court properly found that its child support order remained in force at the time of the show cause hearing, even though the mother's son had turned eighteen years old and was no longer in school, because arrears were still owed to the county.

2. Contempt—civil—child support—failure to pay—ability to pay

In a civil contempt proceeding based on a mother's failure to pay child support arrears, no competent evidence appeared in the record to support the trial court's findings that the mother had the ability to comply with the underlying child support order at the time of the show cause hearing and had the ability to purge the contempt conditions.

Judge BERGER concurring in part and dissenting in part.

Appeal by Defendant from order entered 18 August 2016 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 16 November 2017.

Cumberland County Child Support Department, by Ben Logan Roberts and Roxanne C. Garner, for plaintiff-appellee Cumberland County.

Lewis, Deese, Nance & Briggs, LLP, by Renny W. Deese, for plaintiff-appellee relator.

Michael E. Casterline, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Danita L. Manning ("Defendant") appeals from an order holding her in civil contempt. On appeal, Defendant argues: (1) the contempt order attempts to enforce a child support order no longer in force; and (2) the findings on willfulness and present ability to pay are not supported by competent evidence and do not support the trial court's conclusions. We affirm in part and vacate and remand in part.

I. Factual and Procedural Background

On 31 March 2014, the Cumberland County Child Support Enforcement Agency ("the Agency") filed a complaint on behalf of Lloyd E. Mitchell, Sr. ("Relator"). In the complaint, the Agency alleged the following. Relator and Defendant married on 8 November 1997. The two had one child during the marriage and separated on 1 August 1998. Defendant "has failed or refused to adequately contribute to the support and maintenance of [ ]her minor child(ren)[.]" Defendant "is and has been an able bodied person, capable of providing child support through all times relevant to this action."

The court held a hearing on 24 July 2014. In an temporary child support order entered 19 August 2014, the court ordered Defendant to do the following: (1) pay $187 per month to the North Carolina Centralized Collections; (2) provide her child with medical coverage; and (3) reimburse Relator fifty percent of all unreimbursed medical expenses, after the first $250 per year.

On 2 October 2014, the court held another hearing. On 28 October 2014, the court entered a permanent child support order. The court found Defendant had the ability to pay $187 child support per month and ordered Defendant to do so. The court found Defendant owed $374 of past child support and ordered Defendant to pay $18 per month in arrears.

On 5 April 2016, Defendant filed a motion to set aside/terminate arrears. On 6 April 2016, the court entered an "Order to Appear and Show Cause for Failure to Comply Support Order and Order to Produce Records." (All capitalized in original). In the order, the court found "probable cause to believe [Defendant was] in contempt for failure to comply with" the child support order. The order averred Defendant owed $3,927 in past due support payments. The court ordered Defendant to appear in Cumberland County District Court "to show cause why [she] should not be . . . held in contempt of court for failing to comply with the lawful orders of this Court." The order informed Defendant if the court found her to be in civil contempt, she "may be committed to jail for as long as the civil contempt continues." Although child support payments were suspended because Defendant's son reached his eighteenth birthday and was no longer in school, the Agency sought payment for the amount still in arrears.

On 20 July 2016, court held a show cause hearing, which Defendant attended. Defendant requested a continuance, to set aside prior orders, and to dismiss the show cause order. The court dismissed or denied all of Defendant's requests. The court then heard the Agency's motion for contempt. The parties did not call anyone to testify. Defendant did not present any evidence. The court found Defendant in willful contempt.

On 18 August 2016, the court entered an order for contempt. The court found, *inter alia*:

> 16. That the Court finds all the following facts beyond a reasonable doubt.
>
> ….
>
> d. That the Temporary and Permanent Child Support orders entered were proper, that the Permanent Child Support Order is still valid and the purpose of the Order may still be served by complaince with the Order, to wit: payment of child support.
>
> e. That since the entry of the Order, the Defendant has failed to comply with the payment terms of the aforesaid Order and as of June 30, 2016 owes a total outstanding arrears of $ 3,740.00 and compliance arrears of 3,740.00.
>
> f. That since the entry of the Order, the Defendant has not been under any physical or mental disability that would prevent her from working.

> g. That the Defendant testified and the Plaintiff confirmed that the Defendant's Federal Tax Return in the amount of $1,284.00 were seized for the payment of child support and are on hold through the North Carolina Centralized Collections Agency pending a fraud hold.
>
> h. That the Defendant has not paid the arrears as set forth in the Order to Show Cause prior to this hearing.
>
> i. That the Defendant had the ability to comply with the previous Order and has the ability to purge herself as ordered.

The court concluded "Defendant is in willful contempt of this Court for her failure to comply with the terms and conditions of the order previously entered in this case." The court decreed Defendant owed arrears of $3,740. The court ordered Defendant to pay $205 per month in arrears and set the purge amount at $2,500. The court ordered Defendant to the custody of the Sheriff of Cumberland County.

On or about 12 September 2016, the court reduced the purge amount to $1,000, with an additional $1,500 to be paid by 26 October 2016. On 14 September 2016, Defendant filed notice of appeal from the order for contempt. On 5 October 2016, the court further reduced the purge amount to $500, with additional amounts to be paid on a schedule set by the trial court. On 15 November 2016, the trial court issued a stay of the judgment from the order for contempt pending appeal and ordered Defendant be released from custody.

II. Standard of Review

The standard of review for contempt is:

> limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.

Watson v. Watson, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citations and quotation marks omitted).

III. Analysis

A trial court may hold a party in civil contempt for failure to comply with a court order if:

> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2017).

A. Current Force of the Child Support Order

[1] Defendant contends the trial court erred in holding her in civil contempt because the underlying child support order was no longer in force at the time of her show cause hearing, and, thus, its purpose could not be served by her compliance with the order. We disagree.

This argument was not made at the show cause hearing, and, on appeal, Defendant cites no law supporting this argument. Although Defendant's child support obligation terminated because her son turned eighteen and was no longer in school, the arrears owed to the county remained.

> If an arrearage for child support or fees due exists at the time that a child support obligation terminates, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court.

N.C. Gen. Stat. § 50-13.4(c) (2017).

On 28 October 2014, the court entered the permanent child support order and directed Defendant to pay $187 per month. The order "remain[ed] in full force and effect." Defendant made no child support payments before her son turned eighteen and finished school. The court

found the purpose of the order, "payment of child support[,]" would be served by Defendant's compliance with the order. We conclude competent evidence supports this finding, and the findings and applicable law support the conclusion the child support order remained in force. Accordingly, Defendant's argument is without merit.

B. Challenged Findings[1]

[2] Civil contempt proceedings may be initiated:

> (1) by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt; (2) by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt; or (3) by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. Under the first two methods for initiating a show cause proceeding, the burden of proof is on the alleged contemnor. However, when an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, because there has not been a judicial finding of probable cause.

Moss v. Moss, 222 N.C. App. 75, 77, 730 S.E.2d 203, 204-05 (2012) (brackets, quotation marks, and citations omitted); N.C. Gen. Stat. § 5A-23 (2017).

Nonetheless, our Court recognized the burden shift under the first two ways of commencement does not divest the trial court of its responsibility to make findings of fact supported by competent evidence:

> despite the fact that the burden to show cause shifts to the defendant, our case law indicates that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the

1. Both appellees argue Defendant waived the issue of present ability to pay the child support order and purge amount by not raising the issue below and not presenting any evidence below. However, our Court reviewed this issue in *Tigani*, where neither defendant nor his counsel attended the show cause hearing, thus not arguing the issue of inability to pay at the hearing. ___ N.C. App. at ___, 805 S.E.2d at 548, 551-52. Additionally, an appellant cannot present argument about findings of fact the trial court has not yet made.

> defendant had the ability to pay, in addition to all other required findings to support contempt.

Cty. of Durham v. Hodges, ___ N.C. App. ___, ___, 809 S.E.2d 317, 324 (2018) (citing *Carter v. Hill*, 186 N.C. App. 464, 466, 650 S.E.2d 843, 844 (2007); *Frank v. Glanville*, 45 N.C. App. 313, 316, 262 S.E.2d 677, 679 (1980)). *See also Cty. of Durham v. Burnette*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ____, slip. op. at *8-*9 (N.C. Ct. App. Oct. 16, 2018) (relying on the rule stated in *Hodges*); *Tigani v. Tigani*, ___ N.C. App. ___, ___, 805 S.E.2d 546, 549-52 (2017).

Before holding an obligor in civil contempt, the trial court must find as fact the obligor's failure to comply with the child support order was willful and the obligor has the present ability to pay. *Clark v. Gragg*, 171 N.C. App. 120, 122-23, 614 S.E.2d 356, 358-60 (2005). While our Court has a clear preference for explicit findings on these issues, we will affirm an order when the trial court finds present ability to comply, *but only if* there is competent evidence in the record supporting the finding. *Tigani*, ___ N.C. App. at ___, 805 S.E.2d at 551-52; *Maxwell v. Maxwell*, 212 N.C. App. 614, 619-20, 713 S.E.2d 489, 493 (2011) (citation omitted). *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 574 (1990) (citation omitted) ("Although specific findings as to the contemnor's present means are preferable, this Court has held that a general finding of present ability to comply is sufficient basis for the conclusion of wilfulness necessary to support a judgment of civil contempt."). The finding is binding on appeal if supported by competent evidence. *Watson*, 187 N.C. App. at 64, 652 S.E.2d at 317 (citation omitted).

When determining ability to pay, the trial court must look at two periods of time: (1) the period of time the party did not pay child support; and (2) the date of the hearing, *i.e.* the present ability to comply. *See Tigani*, ___ N.C. App. at ___, 805 S.E.2d at 550-52; *Shippen v. Shippen*, 204 N.C. App. 188, 190-91, 693 S.E.2d 240, 243 (2010) (citation omitted); *Clark*, 171 N.C. App. at 122-23, 614 S.E.2d at 358-59 (citations omitted).

For these findings, there are several points of argument for an appealing contemnor—the lack of a finding on these issues, the *wording* of the finding, and *whether the finding is supported by competent evidence*. *See Tigani*, ___ N.C. App. at ___, 805 S.E.2d at 551 (citing *Maxwell*, 212 N.C. App. 614, 713 S.E.2d 489; *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986)). Said another way, wording sufficient to survive appellate review does not determine whether competent evidence supports the findings. *See id.* at ___, 805 S.E.2d at 551-52.

Additionally, "[t]he order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. The court's conditions under which defendant can purge herself of contempt cannot be vague such that it is impossible for defendant to purge herself of contempt." *Watson*, 187 N.C. App. at 65, 652 S.E.2d at 317 (quotation marks and citation omitted). The trial court must also determine the obligor's present ability to comply with the purge conditions. *Spears v. Spears*, 245 N.C. App. 260, 281-82, 784 S.E.2d 485, 499 (2016) (citation omitted). This finding must also be supported by competent evidence in the record. *Lee v. Lee*, 78 N.C. App. 632, 633-34, 337 S.E.2d 690, 691 (1985).

Here, the trial court entered an order to show cause, which shifted the burden to Defendant. *Moss*, 222 N.C. App. at 77, 730 S.E.2d at 204-05 (citations omitted). The court found "the Defendant *had* the ability to comply with the previous Order and has the ability to purge herself as ordered."[2] (Emphasis added).

While it is true Defendant failed to present evidence below, Defendant's failure to present evidence does not relieve the trial court of its duty to make findings of fact supported by competent evidence. *Hodges*, ___ N.C. App. at ___, 809 S.E.2d at 324 (citations omitted). Turning to whether this finding is supported by competent evidence, we hold it is not.[3] The record is devoid of evidence of Defendant's ability to pay the child support amount or purge amount at the time of the hearing. The record includes Defendant's affidavit of indigency. However, Defendant completed the affidavit on 12 May 2016, and the court held the hearing on 20 July 2016. Thus, the affidavit cannot be evidence of Defendant's *present ability* to pay at the time of the hearing.[4] Neither appellee offered any evidence of Defendant's present ability to pay at the hearing.

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2. We need not determine whether the wording of this finding is sufficient—even minimally—because even if we were to conclude the wording of the finding was sufficient on Defendant's present ability to comply with the support order, as explained *infra*, the finding is not supported by competent evidence. Thus, our holding to vacate and remand would remain the same.

3. Defendant also argues any "findings" on Defendant's ability to pay are not findings, but instead, conclusions of law. However, our case law treats these findings *as findings*. *See e.g.*, *Burnette*, ___ N.C. App. ___, ___ S.E.2d ___, ; *Hodges*, ___ N.C. App. at ____, 809 S.E.2d at 323-25 (explaining the difference between evidentiary findings of fact and ultimate findings of fact).

4. Additionally, two things in the record stand out in our review of Defendant's present ability to pay. First, the trial court repeatedly reduced the purge amount, from $2,500 to $1,000, and then to $500. Second, Defendant required court appointed counsel for the proceedings below.

Therefore, we hold the trial court's finding on Defendant's ability to pay the child support amount owed and the purge amount is not supported by competent evidence.[5] Accordingly, we vacate the order and remand for proceedings not inconsistent with this holding.

IV. Conclusion

For the foregoing reasons, we affirm, in part, the trial court's order and vacate and remand, in part, for proceedings not inconsistent with this opinion. The trial court may, in its discretion, receive evidence on remand.

VACATED AND REMANDED.

Judge INMAN concurs.

Judge BERGER concurring in part; dissenting in part.

BERGER, Judge, concurring in part, dissenting in part by separate opinion.

I concur with the majority that the underlying child support order was in full force and effect. However, because there was sufficient evidence that Defendant was in willful contempt of court, I respectfully dissent and would affirm the trial court's determination.

Defendant and Lloyd E. Mitchell, Sr. ("Mitchell") were married November 8, 1997. Three months later, their son was born, and six months after their son's birth the couple separated. Because Defendant had failed or refused to adequately contribute to the support and maintenance of her child, the Cumberland County Child Support Enforcement Agency (the "Agency") filed a complaint against her on March 31, 2014. In its complaint, the Agency alleged that Defendant was the "Responsible Parent" as defined by N.C. Gen. Stat. § 110-129(3), and she therefore had a legal duty to provide support.

A hearing was conducted in July 2014, and a temporary child support order was entered on August 19, 2014. Both the temporary child support order and a permanent child support order entered on October 26, 2014 found Defendant responsible for paying support for her minor

5. As the trial court's determination of willfulness was predicated upon ability to pay, this portion of the order is also vacated and remanded.

child. The permanent child support order required Defendant to make child support payments of $187.00 per month and arrears payments of $18.00 per month.

On April 6, 2016, Defendant owed $3,927.00 in past due support payments. The trial court entered an Order to Appear and Show Cause for Failure to Comply with the Support Order and Order to Produce Records. In the order, the trial court found "that there is probable cause to believe that [Defendant is] in contempt for failure to comply with the order(s) of this Court and/or [Defendant has] failed to comply with other provisions of the" child support order. The trial court ordered Defendant to appear in Cumberland County District Court "to show cause why [she] should not be . . . held in contempt of court for failing to comply with the lawful orders of this Court." The order also put Defendant on notice that, if found to be in civil contempt, she "may be committed to jail for as long as the civil contempt continues." Defendant was served with the trial court's order on April 21, 2016 by a deputy with the Cumberland County Sheriff's Department.

Defendant had made no payments since the entry of the permanent child support order on October 2, 2014. Although child support payments had been suspended because the parties' son had reached his eighteenth birthday and was no longer in school, the Agency sought payment for the amount still in arrears.

On July 20, 2016, the show cause hearing was conducted in Cumberland County District Court. During the hearing, Defendant was given the opportunity to introduce evidence, but she provided none. The trial court found Defendant to be in civil contempt of the support order, ordered her into custody, and set the contempt purge amount at $2,500.00.

The matter was readdressed by the trial court on July 27, 2016, and Defendant remained in jail at that time. On August 17, 2016, the purge amount required was reduced to $1,000.00, with an additional $1,500.00 to be paid by October 26, 2016. Defendant remained in custody when the matter was again addressed on August 24 and August 31, 2016. On September 7, 2016, the purge amount was further reduced to $500.00, with additional amounts to be paid on a schedule set by the trial court. On September 14, 2016, Defendant filed notice of appeal from the order for contempt. On September 21, 2016, the trial court issued a stay of the judgment from the order for contempt pending appeal and ordered Defendant be released from custody.

A trial court may hold a party in civil contempt for failure to comply with a court order if:

> (1) [t]he order remains in force;
>
> (2) [t]he purpose of the order may still be served by compliance with the order;
>
> (2a)[t]he noncompliance by the person to whom the order is directed is willful; and
>
> (3) [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2017).

> Civil contempt is designed to coerce compliance with a court order, and a party's ability to satisfy that order is essential. Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply.

Watson v. Watson, 187 N.C. App. 55, 66, 652 S.E.2d 310, 318 (2007) (citations and quotation marks omitted).

Where there is "a show cause order with a judicial finding of probable cause[,] . . . the burden was on [contemnor] to show why he should not be held in contempt." *Gordon v. Gordon*, 233 N.C. App. 477, 480, 757 S.E.2d 351, 353 (2014) (citations and quotation marks omitted). "The party alleged to be delinquent has the burden of proving either that he lacked the means to pay or that his failure to pay was not willful." *Shumaker v. Shumaker*, 137 N.C. App. 72, 76, 527 S.E.2d 55, 57 (2000). The burden is only on an aggrieved party when there is a motion for contempt filed pursuant to N.C. Gen. Stat. § 5A-23(a1). "The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party." N.C. Gen. Stat. § 5A-23(a1) (2017); *but see Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 303 (2004) (noting the contempt proceeding was initiated by a motion and notice of hearing by an aggrieved party and not by order or notice from the court, "there is no basis to shift the burden of proof to the alleged contemnor in this case.").

Here, the record plainly reflects that the trial court entered an order directing Defendant to appear at a specified time to show cause why she should not be held in civil contempt. The burden was on Defendant to show that she was not in contempt of the child support order. A "defendant refuses to present such evidence at h[er] own peril." *Hartsell v. Hartsell*, 99 N.C. App. 380, 387, 393 S.E.2d 570, 575 (1990), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991).

"To show such cause, a party must establish a lack of means to pay support or an absence of willfulness in failing to pay support." *Belcher v. Averette*, 136 N.C. App. 803, 807, 526 S.E.2d 663, 665 (2000). "It is well established that in civil contempt proceedings to enforce orders for child support, the court is required to find only that the allegedly delinquent obligor has the means to comply with the order and that he or she wilfully refused to do so." *Plott v. Plott*, 74 N.C. App. 82, 84-85, 327 S.E.2d 273, 275 (1985).

Additionally, "[t]he order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. The court's conditions under which defendant can purge herself of contempt cannot be vague such that it is impossible for defendant to purge herself of contempt." *Watson*, 187 N.C. App. at 65, 652 S.E.2d at 317 (citations and quotation marks omitted). "Although specific findings as to the contemnor's present means are preferable, this Court has held that a general finding of present ability to comply is sufficient basis for the conclusion of wilfulness necessary to support a judgment of civil contempt." *Hartsell*, 99 N.C. App. at 385, 393 S.E.2d at 574.

Here, the record reflects that on October 2, 2014 a child support order was entered directing Defendant to pay $205.00 per month, and that the order "remain[ed] in full force and effect." The court found that the purpose of the order, "payment of child support," would be served by Defendant's compliance with the order. The trial court's findings also reflect that Defendant had "the means to comply with the order and that . . . she wilfully refused to do so." *Plott*, 74 N.C. App. at 84-85, 327 S.E.2d at 275.

Further, the trial court found that Defendant was not prevented from working due to "any physical or mental disability," and she had an income tax refund that had been intercepted to apply to her child support obligation. In addition, Defendant was late to court on the day of the contempt hearing because she was at work, and she informed the trial court that she was "an insurance agent." She also claimed she

was unemployed. When given the opportunity to present evidence at the show cause hearing, Defendant failed to produce any evidence demonstrating that she lacked the means to comply with the order, or that her failure to pay was not willful.

The trial court found Defendant's noncompliance with the child support order to be willful; that she had the present ability to comply; and the conditions by which Defendant could purge the contempt were clear. *See Watson*, 187 N.C. App. at 65, 652 S.E.2d at 317. To purge the contempt, Defendant was required to pay $2,500.00 of the $3,740.00 owed.

Based upon the record before us, there was sufficient information available to the trial court to find that Defendant had the means to comply with the order and that she wilfully refused to do so. The trial court's findings are binding on this Court, and are sufficient to warrant entry of civil contempt. Defendant was given an opportunity to prove her inability to comply with a valid court order, but she presented no evidence. Because Defendant was in civil contempt of the child support order, I would affirm.

IN THE MATTER OF WILLIAM THOMAS DUNCAN, JR., PETITIONER-APPELLANT

No. COA18-318

Filed 20 November 2018

1. Appeal and Error—appealability—interlocutory orders—motions to dismiss

The petitioner's motions to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) in a child abuse action in which petitioner was placed on the responsible persons list were dismissed on appeal as interlocutory. There is no right to appeal from the denial of a motion to dismiss pursuant to Rule 12(b)(1). The denial of a Rule 12(b)(6) motion is also an interlocutory order from which no immediate appeal may be taken; while defendant argued that this constituted the dismissal of a defense, the effect of the order was that the defense was not proven as a matter of law. Nothing precluded petitioner from making his argument at his hearing on judicial review pursuant to N.C.G.S. § 7B-323.

2. Appeal and Error—appealability—preservation of issues—interlocutory order—denial of motion for trial—substantial right

The denial of petitioner's motion for a new trial affected a substantial right that could be lost without immediate review and his arguments were heard on appeal.

3. Constitutional Law—North Carolina—jury trial

Petitioner had no right to a trial by jury where he was placed on a list of responsible individuals (RIL) pursuant to N.C.G.S. § 7B-311(b) after an investigation for child abuse. The right to a jury trial is limited to cases where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted. While the right to trial by jury can still be created by statute, it is undisputed that no statutory right exists to a jury trial upon petition for judicial review pursuant to N.C.G.S. § 7B-323. The proceeding in the present case was unknown at common law. Furthermore, petitioner did not raise to the trial court his argument that the matter was akin to a common law defamation action that existed when the Constitution of 1868 was adopted, and the argument was not preserved for appeal. Even if he had done so, placing his name on the RIL list could not be reasonably analogized to defamation.

Appeal by Petitioner from orders entered 15 December 2017 and 12 January 2018 by Judge Robert M. Wilkins in District Court, Randolph County. Heard in the Court of Appeals 1 October 2018.

Chrystal S. Kay for Randolph County Department of Social Services, Respondent-Appellee.

Woodruff Law Firm, PA, by Carolyn J. Woodruff and Jessica Snowberger Bullock, for Petitioner-Appellant.

McGEE, Chief Judge.

I. Factual and Procedural Background

A minor child ("D.M.") was placed in the care and custody of William Thomas Duncan, Jr. ("Petitioner") from 8 August 2015 until 17 September 2015, while Petitioner was being considered as an adoptive parent for D.M. Due to allegations of abuse, D.M. was removed from Petitioner's custody on 17 September 2015. Upon completion of the investigation of the allegations, and pursuant to N.C. Gen. Stat. §§ 7B-311(b) and 7B-320(a) (2017), Randolph County Department of

Social Services ("DSS") made the decision to cease consideration of Petitioner as an adoptive parent, and to place Petitioner on the responsible individuals list ("RIL"). N.C.G.S. § 7B-311(b). A person is placed on the RIL after "an investigative assessment response that results in a determination of abuse or serious neglect and the identification of a responsible individual[.]" N.C.G.S. § 7B-320(a). Petitioner filed multiple motions pursuant to N.C. Gen. Stat. § 7B-323(a) (2017), requesting judicial review, and requesting that the trial court "dismiss the . . . action, or deny the decision to place him on the RIL (the "motion to dismiss").[1] Petitioner also filed a 29 December 2017 motion for a jury trial. These matters were heard on 15 November 2017 and 10 January 2018. By order entered 15 December 2017, the trial court denied "Petitioner's motion to deny/dismiss" DSS's decision to place him on the RIL. The trial court denied Petitioner's motion for a jury trial by order entered 12 January 2018. Petitioner appeals.

II. Interlocutory Orders

Petitioner appeals from orders denying his motion to dismiss and his motion for a jury trial. As Petitioner acknowledges, both of these orders are interlocutory, but Petitioner argues that they are immediately appealable. DSS filed a "Motion to Dismiss" on 20 July 2018, contending that both orders were not only interlocutory, but not immediately appealable. We grant DSS's motion to dismiss in part, and deny it in part.

A. *15 December 2017 Order*

[1] In the motion to dismiss, Petitioner argued that he could not be placed on the RIL because he was not a "caretaker" as defined by N.C. Gen. Stat. § 7B-101(3) (2017), and as required on the present facts by N.C.G.S. § 7B-101(18a). In the trial court's 15 December 2017 order, it denied "Petitioner's motion to deny/dismiss [] DSS['s] decision to place Petitioner's name on the [RIL] because Petitioner was not a 'caretaker[.]' " DSS contends that Petitioner's argument should be dismissed because Petitioner has no right to appeal from the 15 December 2017 interlocutory order dismissing Petitioner's motion to dismiss DSS's determination that Petitioner was a "responsible individual" as defined by N.C.G.S. § 7B-101(18a). We agree with DSS and dismiss this argument.

Petitioner argued that the present action should be dismissed pursuant to Rule 12(b)(1) or Rule 12(b)(6) of our Rules of Civil Procedure. There is no right of immediate appeal from the interlocutory denial

1. A motion was filed on 6 November 2017, two motions were filed on 14 November 2017, and another motion was filed on 27 November 2017.

of a motion to dismiss pursuant to Rule 12(b)(1). *Hinson v. City of Greensboro*, 232 N.C. App. 204, 209, 753 S.E.2d 822, 826 (2014). Further, "The denial of a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12(b)(6), Rules of Civil Procedure, G.S. 1A-1, is an interlocutory order from which no immediate appeal may be taken." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982) (citations omitted).

In addition, contrary to Petitioner's argument in his "Statement of the Grounds for Appellate Review," the 15 December 2017 order does not "strike[] an entire defense, so that the order in effect grants a demurrer against that defense[.]" (Emphasis in original). The trial court denied Petitioner's motion to dismiss the determination placing him on the RIL. However, the 15 December 2017 order included no determination that Petitioner was a "caretaker" as defined by N.C.G.S. § 7B-101(18a). The effect of the trial court's ruling was simply that Petitioner had not *proven*, as a *matter of law*, that he was not a "caretaker" at any time relevant to DSS's RIL determination. Nothing in the 15 December 2017 order precludes Petitioner from making his "caretaker" argument at a hearing pursuant to his N.C.G.S. § 7B-323 right to judicial review. Because Petitioner's appeal of the 15 December 2017 order is an improper interlocutory appeal from the denial of a motion to dismiss pursuant to Rule 12(b)(1) or Rule 12(b)(6), we grant DSS's motion to dismiss this portion of Petitioner's appeal.

B. *12 January 2018 Order*

[2] Petitioner argues that the trial court's denial of his 29 December 2017 "Motion for Jury Trial" affects a substantial right of his that could be lost without immediate review. We agree.

> As an initial matter, we note that while the order defendant appeals from is interlocutory, since the trial court denied defendant's request for a jury trial the order affects a substantial right and is, therefore, immediately appealable. *In re McCarroll*, 313 N.C. 315, 327 S.E.2d 880 (1985); *Dick Parker Ford, Inc. v. Bradshaw*, 102 N.C. App. 529, 402 S.E.2d 878 (1991).

Dept. of Transportation v. Wolfe, 116 N.C. App. 655, 656, 449 S.E.2d 11, 12 (1994). We therefore address Petitioner's argument that the trial court erred in denying his motion for a jury trial.

III. Analysis

[3] Petitioner's argument on appeal is that the North Carolina Constitution requires that he receive a jury trial in the present case. We disagree.

At trial, Petitioner made the following argument relative to the North Carolina Constitution:

> [PETITIONER'S ATTORNEY:] I will be up front with you that the statute says you cannot get a jury trial[.]
>
> . . . .
>
> Right, moving right along. And then number E is the North Carolina Constitution and this is where probably I have and [Petitioner] has the most trouble, page 3 of this section 13, this is the Constitution currently in effect: "Forms of actions: there shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs which shall be denominated as a civil action," which is what this is, "and which there shall be a right to have issues of fact tried before a jury."
>
> THE COURT: Okay.
>
> [PETITIONER'S ATTORNEY:] And then it says in two, "No rule of procedure or practice shall abridge substantive rights, abrogate or limit the right of trial by jury." So we need an answer to that.

On appeal, Petitioner first argues: "[U]nder the North Carolina Constitution, '[i]n all actions where legal rights are involved, and issues of fact are joined by the pleadings, [a party] is entitled to a trial by jury.' *Andrews v. Pritchett*, 66 N.C. 387, 388 (1872)." However, there is not a constitutional right to a jury trial in *every* action where legal rights are involved and issues of fact are raised. As Petitioner acknowledges, the right to a jury trial in North Carolina is limited: "The right to trial by jury under article I has long been interpreted by this Court to be found *only* where the prerogative existed by statute or at common law *at the time the Constitution of 1868 was adopted*." *Kiser v. Kiser*, 325 N.C. 502, 507, 385 S.E.2d 487, 490 (1989) (citations omitted) (emphasis added). Nonetheless: "Where the cause of action fails to meet these criteria and hence a right to trial by jury is not constitutionally protected, it can still be created by statute." *Id.* at 508, 385 S.E.2d at 490 (citation omitted). In

the present case, it is undisputed that no statutory right exists to a jury trial upon petition for judicial review pursuant to N.C.G.S. § 7B-323.

> At the hearing, the director shall have the burden of proving by a preponderance of the evidence the abuse or serious neglect and the identification of the individual seeking judicial review as a responsible individual. *The hearing shall be before a judge without a jury.* The rules of evidence applicable in civil cases shall apply.

N.C.G.S. § 7B-323(b) (emphasis added).

This Court has held the statutory requirement that termination of parental rights proceedings are heard by the trial court without a jury is constitutional.

> Proceedings to terminate parental rights in children were unknown at the common law. Nor did they exist by statute at the time of the adoption of our constitution. The statute establishing these proceedings was first adopted by the legislature in 1969. The legislature in adopting this procedure established the policy of having the issues decided by the court without a jury. This was properly the prerogative of the legislature.
>
> There was no right to jury trial at common law in proceedings to terminate parental rights, nor by statute at the time our constitution was adopted, and it is not now provided for by the statute. Therefore, we hold appellant's motion for a trial by jury was properly denied.

In re Ferguson, 50 N.C. App. 681, 683–84, 274 S.E.2d 879, 880 (1981) (citation omitted). The proceeding in the present case was also unknown at the common law and, therefore, was not subject to the constitutional right to a jury trial. *Id.*

However, Petitioner, for the first time on appeal, argues that the matter before us is akin to a common law defamation action and, therefore, should be treated as an action that "existed . . . at common law at the time the Constitution of 1868 was adopted." *Kiser*, 325 N.C. at 507, 385 S.E.2d at 490 (citations omitted). Petitioner has not preserved this argument for appellate review.

> N.C. Appellate Procedure Rule 10(a)(1) mandates that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request,

> objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." . . . . This general rule applies to constitutional questions, as constitutional issues not raised before the trial court "will not be considered for the first time on appeal."

State v. Spence, 237 N.C. App. 367, 369–70, 764 S.E.2d 670, 674 (2014) (citations omitted). Petitioner did not make the argument to the trial court that the conduct of DSS in this matter was substantially similar to a common law defamation action. In fact, Petitioner did not make any argument that "the prerogative [of a jury trial] existed . . . at common law at the time the Constitution of 1868 was adopted." *Kiser*, 325 N.C. at 507, 385 S.E.2d at 490 (citations omitted). The general constitutional challenge Petitioner made at trial did not "stat[e] the specific grounds for the ruling the party desired the court to make" and "the specific grounds were not apparent from the context" of Petitioner's argument. N.C. R. App. P. 10(a)(1); *Spence*, 237 N.C. App. at 369-70, 764 S.E.2d at 674. We therefore dismiss this part of Petitioner's argument.

Assuming, *arguendo*, Petitioner had preserved this argument, it would still fail. As Petitioner notes, if he believed DSS engaged in conduct that would warrant it, he "could bring an action for government defamation." Petitioner has that right. If such an action were allowed to proceed to trial, Petitioner would have the right to a jury trial – as would DSS. However, it simply does not follow that placing Petitioner's name on the RIL can be reasonably analogized to initiation of an action for defamation. " 'In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person.' " *Craven v. SEIU Cope*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (citations omitted). DSS did not initiate a defamation action by following the statutory procedures for placing Petitioner on the RIL. Petitioner did not file anything that could be considered a counterclaim to DSS's "action," much less a counterclaim for defamation. There has been no allegation in any pleading that DSS defamed Petitioner. The fact that the allegations against Petitioner necessary for his inclusion on the RIL might be harmful to him, or that the filing of the RIL itself might be harmful to him, cannot transform the present proceeding into an action for defamation, or anything remotely akin to one.

In abuse and neglect proceedings pursuant to Chapter 7B, DSS regularly makes allegations of conduct that could seriously "stigmatize" the persons involved, and potentially "penalize" those persons,

by negatively impacting their abilities to pursue certain jobs or other endeavors. However, as cited above, this Court held that there was no right to a jury trial in termination proceedings. *In re Ferguson*, 50 N.C. App. at 683–84, 274 S.E.2d at 880 ("There was no right to jury trial at common law in proceedings to terminate parental rights, nor by statute at the time our constitution was adopted, and it is not now provided for by the statute. Therefore, we hold appellant's motion for a trial by jury was properly denied."). Although Petitioner's argument concerning the inherent damage to his reputation was not specifically addressed in *In re Ferguson*, we reach the same result with respect to Petitioner's argument. DSS's placement of a person on the RIL cannot itself constitute anything akin to an action for defamation, and does not provide the "responsible individual" with any constitutional right to a trial by jury. This does not mean, of course, that there is no recourse – by a motion in the cause or by separate action – if the RIL process is abused. Because Petitioner had no right to a trial by jury, the trial court did not err in denying Petitioner's motion for a jury trial.

DISMISSED IN PART; AFFIRMED IN PART.

Judges ELMORE and ARROWOOD concur.

IN THE MATTER OF I.B.

No. COA18-608

Filed 20 November 2018

1. Termination of Parental Rights—no-merit brief—Rule 3.1(d)—independent review—not required

The Court of Appeals reaffirmed its holding that Rule of Appellate Procedure 3.1(d) does not require the appellate court to conduct an independent review of the record in termination of parental rights cases in which the parent's attorney has filed a no-merit brief and the parent has not filed a separate brief. The clear and unambiguous text of Rule 3.1(d) does not require such review, and the exclusion of such language must be presumed to be purposeful.

2. Termination of Parental Rights—no-merit brief—Rule 3.1(d)—independent review

Where a mother's parental rights were terminated on the grounds of neglect and dependency, her attorney filed a no-merit

brief pursuant to Rule of Appellate Procedure 3.1(d), and the mother did not file a separate brief, the Court of Appeals elected to conduct an independent review of the record in its discretion and concluded that any arguments the mother might advance on appeal were frivolous.

Appeal by respondent-mother from order entered 22 March 2018 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 11 October 2018.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Mary McCullers Reece for respondent-appellant mother.

Doughton Blancato, PLLC, by William A. Blancato, for guardian ad litem.

DIETZ, Judge.

Respondent appeals the trial court's order terminating her parental rights. Her court-appointed counsel filed a "no-merit" brief indicating that there are no non-frivolous issues on appeal. We have conducted an independent review of the record and agree that any arguments Respondent might advance on appeal are frivolous. We therefore affirm the trial court's order.

We could end our analysis here. But because this Court has found itself so divided over whether we *must* conduct an independent review in these cases, we take the time to provide a thorough legal analysis.

As explained below, the root of this issue is the language in *Anders v. State of California*, 386 U.S. 738 (1967). In *Anders*, the U.S. Supreme Court created a multi-step process to handle cases in which a criminal defendant has a constitutional right to counsel, but the defendant's appointed lawyer concludes that any arguments on appeal would be frivolous. The final step in that process is the appellate court's independent review of the record to confirm the appeal is "wholly frivolous." *Id.* at 744.

When our state Supreme Court created an *Anders*-like process for juvenile cases (civil cases to which *Anders* does not apply) through Rule 3.1(d) of the Rules of Appellate Procedure, the Court adopted most of the steps in the *Anders* process, often copying the language of the

Anders opinion verbatim. But the Supreme Court did not include the language concerning counsel's obligation to withdraw and the court's independent review of the record, both of which lie at the heart of the *Anders* process.

This could have been an oversight. But even if we concluded that it was, this Court has no authority to insert language into the text of procedural rules because the Court thinks the authors would have wanted it there. Moreover, as explained below, there are sound reasons why the Supreme Court might have omitted this language to broaden indigent litigants' access to justice, not diminish it. Faced with this reality, until otherwise instructed by our Supreme Court, we will follow the plain language of Rule 3.1(d). That language, in conjunction with our existing precedent, permits but does not require this Court to conduct an independent review of the record in these cases.

Facts and Procedural History

When Respondent's son Ike[1] was born, his blood tested positive for illegal drugs. At a check-up while eighteen months old, healthcare providers discovered that Ike had gained only slightly more than a pound of weight during the last year. They diagnosed Ike with failure to thrive, indicating abnormal growth and development. Respondent later was arrested on drug charges, was diagnosed with several mental illnesses including bipolar disorder and schizophrenia, and was found to be living in a relationship involving domestic violence.

Ultimately, the Orange County Department of Social Services petitioned to terminate Respondent's parental rights based on neglect and dependency. After a hearing, the trial court terminated Respondent's parental rights on both grounds. Respondent timely appealed.

Respondent's court-appointed counsel filed a "no-merit" brief indicating that there were no non-frivolous issues to assert in this appeal. That brief provided an outline of issues that "might arguably support the appeal" and an explanation of why those issues were frivolous, as required by Rule 3.1(d) of the Rules of Appellate Procedure. Counsel provided a copy of the brief to Respondent along with the record on appeal and accompanying transcripts, and a letter advising Respondent of her right to file her own brief and the timeframe for doing so. Respondent did not file a separate brief.

1. We use a pseudonym to protect the identity of the juvenile.

Analysis

[1] This Court is no one's lawyer. Our role is to remain impartial, to review the litigants' issues on appeal, and to render a judgment on those issues. Thus, ordinarily, this Court will not comb through the appellate record searching for possible arguments no one else had thought to raise. Our review is confined to the issues that the litigants *choose* to assert on appeal.

But the Sixth and Fourteenth Amendments alter this rule (slightly) in certain criminal cases. In *Anders v. State of California*, 386 U.S. 738 (1967), the Supreme Court established a special procedure to handle cases in which a criminal defendant has a constitutional right to counsel, but the defendant's appointed counsel concludes that any arguments on appeal would be "wholly frivolous." *Id.* at 744. When this occurs, the *Anders* process begins, and it works as follows:

First, counsel must "advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* Second, "[a] copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses." *Id.* Third, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal." *Id.* "On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.*

Importantly, the *Anders* process is designed around counsel's request to withdraw. The entire purpose of the *Anders* brief and the court's "independent review" of the record (the *Anders* opinion doesn't actually call it that) is to assist the court "in making the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw." *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 439 (1988).

For this reason, the court's *Anders* review does not entail an independent *adjudication* of potentially non-frivolous arguments identified during the court's review of the record. The independent review under *Anders* is limited to confirming that the appeal is "wholly frivolous." 386 U.S. at 744. If the court agrees that it is—meaning the court sees no potentially non-frivolous arguments—the court grants counsel's motion to withdraw and dismisses the appeal as frivolous. *Id.* On the other hand, if the court spots any issues of arguable merit, its independent review

ends and it either rejects counsel's motion to withdraw or, more typically, grants that motion but appoints new, substitute counsel and orders counsel to file a brief on the merits. *See*, *e.g.*, *United States v. Estevez Antonio*, 311 F. App'x 679, 681 (4th Cir. 2009). The case then proceeds like any other appeal.

In criminal cases in our State courts, we must follow the *Anders* procedure because it arises from the protections guaranteed by the Sixth and Fourteenth Amendments. But there are other categories of cases in North Carolina where litigants have a *statutory* right to counsel but not a *constitutional* one. A decade ago, this Court examined whether *Anders* applies to a case like this one, concerning the termination of parental rights, where the right to counsel was provided by statute, not by the state or federal constitution. *In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007). We held that *Anders* did not apply. *Id*. This meant that "counsel for a parent appealing an order terminating parental rights did not have a right to file an *Anders* brief." *Id*. But we "urge[d] our Supreme Court or the General Assembly to reconsider this issue." *Id*.

Our Supreme Court did. The Court amended Rule 3.1 of the North Carolina Rules of Appellate Procedure to add a section titled "No-Merit Briefs." N.C. R. App. P. 3.1(d). That section adopted most of the requirements of *Anders*, often by copying verbatim from the language of Justice Clark's majority opinion in the case. But the Supreme Court's amendment to Rule 3.1 left out two prominent parts of the *Anders* process: (1) the requirement that counsel move to withdraw; and (2) the court's obligation to review the record and confirm the appeal is wholly frivolous before granting the motion to withdraw and dismissing the appeal.

Why? When our Supreme Court drafted Rule 3.1(d), *Anders* had been around for forty years and its multi-step procedure was well-settled. So why leave out these two critical steps of the *Anders* process?

To be sure, it could have been an oversight. But it is also possible that this omission was intended—that our Supreme Court chose an alternative approach different from the withdrawal-focused approach in *Anders*. After all, as the U.S. Supreme Court has acknowledged, "public defenders making withdrawal decisions are viewed by indigent prisoners as hostile state actors." *Polk County v. Dodson*, 454 U.S. 312, 324 (1981). The Supreme Court emphasized that there is "little justification for this view," but it nonetheless exists among many indigent defendants. *Id*. And although it may be inaccurate, this view is not irrational—when your lawyer asks the court for permission to quit, it's not unreasonable to conclude your lawyer isn't on your side anymore.

What our Supreme Court might have intended with Rule 3.1(d) was to avoid the tension that results when counsel seeks to terminate the attorney-client relationship when submitting an *Anders* brief. Rule 3.1(d) provides the following:

> **No-Merit Briefs**. In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

N.C. R. App. P. 3.1(d).

The rule does not anticipate that counsel will seek to terminate the attorney-client relationship and, indeed, counsel in these cases do not do so. Instead, Rule 3.1(d) permits the attorney to continue advising the client about the allegations in the case, the standards of review on appeal, the rules of appellate procedure, and other legal complexities of an appeal. The attorney's continued service assures that the client will be able to file a brief raising the arguments she believes the court should address (which, because the client is not bound by ethical rules concerning frivolous arguments, may include issues the lawyer could not assert).

Examining this procedure in light of the *Anders* process, one can see that it anticipates a slightly different set of submissions to the Court: (1) a no-merit brief from counsel, which must "identify any issues in the record on appeal that might arguably support the appeal"; (2) the client's *pro se* principal brief and reply brief, prepared with access to counsel to assist with procedural and substantive legal questions; and (3) the briefs of the other parties in the appeal. N.C. R. App. P 3.1(d). With this information in hand, this Court can then adjudicate the appeal

as it would any other—by addressing the issues raised in the briefs and treating issues not raised as abandoned. N.C. R. App. P. 28(b)(6). Through this process, there is no need for the Court to conduct an independent review of the record, as would be necessary under *Anders* where the Court's focus is whether to permit counsel to withdraw from the case.

Is this what the Supreme Court intended? Or did the Court intend to include the independent review requirement under *Anders* despite not saying so in the text of the rule? We have no way to know, and that's the point. "This Court is an error-correcting body, not a policy-making or law-making one." *Davis v. Craven County ABC Board*, __ N.C. App. __, __, 814 S.E.2d 602, 605 (2018). When asked to interpret a procedural rule, we look not to what we would have done as drafters of the rule, but instead to the text and to principles of textual interpretation. These tools lead us to conclude that an independent review by the Court is not a requirement of Rule 3.1(d).

First, there is no ambiguity in the text; the rule simply does not require the Court to conduct an independent review. Because the text itself is clear and unambiguous, "there is no room for judicial construction." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018).

Second, canons of interpretation support this plain-language approach. The Supreme Court knew *Anders* required an independent review in criminal cases, copied much of *Anders* into Rule 3.1(d), but left out the independent review language. The decision to exclude that language is presumed to be purposeful. *See Comstock v. Comstock*, 244 N.C. App. 20, 24, 780 S.E.2d 183, 186 (2015). Moreover, by departing from the settled language of *Anders* and instead adopting a different rule, we must presume that the Supreme Court intended something different than what *Anders* requires. *See Wells Fargo Bank, N.A. v. American Nat'l Bank & Tr. Co.*, __ N.C. App. __, __, 791 S.E.2d 906, 910 (2016).

Third, as explained above, there are sound reasons why the Supreme Court might have left out this independent review requirement, in order to avoid the tension created by counsel seeking to withdraw from the case. Thus, our plain-text interpretation is a reasonable one and certainly not the type of "absurd result" that permits us to disregard the text. *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361–62, 250 S.E.2d 250, 253 (1979).

These settled rules of interpretation support a conclusion that we are not required to conduct an independent review of the record under

the text of Rule 3.1(d) as it is written. And even if we thought otherwise, we are not permitted to depart from this Court's recent holding in *In re L.V.*, __ N.C. App. __, __, 814 S.E.2d 928, 929 n.2 (2018), that "Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Of course, holding that an independent review is not *required* does not mean we cannot conduct one. Even before Rule 3.1(d) existed, in juvenile cases where court-appointed counsel believed the appeal was wholly frivolous, this Court acknowledged that it had the discretion to "review the record to determine whether the evidence supports the trial court's findings of fact and conclusions of law." *N.B.*, 183 N.C. App. at 119, 644 S.E.2d at 25 (citing N.C. R. App. P. 2). As our Supreme Court later emphasized, when a litigant has lost the right to argue an issue due to a rules violation unrelated to jurisdiction in the trial court, "[t]he imperative to correct fundamental error, however, may necessitate appellate review of the merits despite the occurrence of default." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). Moreover, this Court always has authority under Rule 2 to suspend our procedural rules entirely in extraordinary cases to prevent "manifest injustice." N.C. R. App. P. 2. We can use these forms of discretionary authority to conduct an independent review, where appropriate, to ensure justice is done in these important cases. What we cannot do is rewrite our State's procedural rules to impose requirements that simply aren't there.

[2] With these principles in mind, we have reviewed the submissions of the parties in this case, conducted our own review of the record in our discretion, and determined that the trial court's findings of fact are supported by competent evidence and those findings, in turn, support the court's conclusions of law. We therefore affirm the trial court's order.

AFFIRMED.

Judges BRYANT and INMAN concur.

KEVIN MCKENZIE, ADMINSTRATOR OF THE ESTATE OF YVONNE LEWIS, PLAINTIFF
v.
RICHARD CHARLTON, INDIVIDUALLY, RICHARD CHARLTON, DBA NY HOMES II, APAC-ATLANTIC, INC., D/B/A HARRISON CONSTRUCTION AND REACH FOR INDEPENDENCE, INC., DEFENDANTS

No. COA18-82

Filed 20 November 2018

Agency—vicarious liability—respondeat superior—caregiving services

Defendant disability services company could be held vicariously liable for the torts committed by one of its caregivers while providing services to the company's clients under the contract (between the company and the caregiver), where the contract gave defendant company authority to exercise sufficient control over defendant caregiver in his performance of caregiving services to be deemed an employee for purposes of respondeat superior.

Appeal by Plaintiff from order entered 13 July 2017 by Judge Casey M. Viser in Buncombe County Superior Court. Heard in the Court of Appeals 5 September 2018.

White & Stradley, PLLC, by J. David Stradley and Lakota R. Denton, P.A., for the Plaintiff-Appellant.

Davis and Hamrick, L.L.P., by Ann C. Rowe, for Defendant-Appellee Reach for Independence, Inc.

Ball Barden & Cury P.A., by Ervin L. Ball, Jr., for Defendant-Appellee Richard Charlton, individually, and dba NY Homes II.

DILLON, Judge.

This matter stems from a traffic accident in which Yvonne Lewis was struck and killed by an automobile being driven by Defendant Richard Charlton as Ms. Lewis was walking across a public street.

Plaintiff Kevin McKenzie, in his capacity as the administrator for Ms. Lewis' estate, filed this action against Mr. Charlton and against Defendant Reach for Independence, Inc. ("Defendant RFI"), whom Plaintiff alleges Mr. Charlton was working for at the time of the accident.

This present appeal is brought by Plaintiff from an interlocutory order in which the trial court granted partial summary judgment to Defendant RFI, concluding that Mr. Charlton was acting as an independent contractor and not as an employee of Defendant RFI at the time of the accident. After careful review of the record, we conclude that there was a genuine issue of material fact as to whether Defendant RFI is liable for Ms. Lewis' death under the doctrine of *respondeat superior*. We, therefore, reverse the order of the trial court and remand for further proceedings.

I. Background

Defendant RFI is a government-regulated provider of Medicaid-funded services to disabled individuals. Defendant RFI contracts with paraprofessional caregivers to provide these services. In late 2014, Defendant RFI entered into a contract with Mr. Charlton to serve as a paraprofessional caregiver for disabled patients.

In January 2015, Mr. Charlton's contractual obligations with Defendant RFI involved spending approximately forty (40) hours per week, providing one-on-one supervision of a certain disabled individual, hereinafter referred to as Mr. Smith[1]. At the time of the accident, Mr. Charlton was not providing caregiving services to or for anyone else either on behalf of Defendant RFI or otherwise.

On 8 January 2015, while Mr. Smith was a passenger in Mr. Charlton's car, Mr. Charlton struck Ms. Lewis as she was crossing a public street. Ms. Lewis later died as a result of the accident.

Plaintiff filed a wrongful death action against both Defendant RFI and Mr. Charlton, alleging negligence in the death of Ms. Lewis. Defendant RFI moved for summary judgment. After a hearing on the matter, the trial court granted the motion with respect to Plaintiff's wrongful death claim,[2] holding that Mr. Charlton was an independent contractor of Defendant RFI and, therefore, Defendant RFI was not liable under *respondeat superior*.

Plaintiff appeals.

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1. A pseudonym is used to protect the identity of the client and to comply with any regulations that may apply to services provided by Defendant RFI.

2. Plaintiff also brought claims against Defendant RFI for negligent hiring of and negligent entrustment to Mr. Charlton, but those claims were not included in the partial summary judgment and are not before this Court.

II. Appellate Jurisdiction

Plaintiff is appealing from an interlocutory order which does not contain a Rule 54(b) certification. Therefore, Plaintiff's appeal is premature *unless* the order affects a substantial right. *See Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291-92, 420 S.E.2d 426, 428 (1992). Following the reasoning of our Supreme Court in *Bernick v. Jurden*, we conclude that the order, indeed, does affect a substantial right: "[W]e hold that because of the possibility of inconsistent verdicts in separate trials, the order allowing summary judgment for fewer than all the defendants in the case before us affects a substantial right." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982).

III. Analysis

Plaintiff challenges the trial court's decision granting summary judgment in favor of Defendant RFI, in which the trial court held that Defendant RFI was *not* vicariously liable under *respondeat superior*. We review the trial court's summary judgment decision *de novo*, to determine whether, in the light most favorable to the non-moving party, the full record shows a genuine issue as to any material fact. *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007). Specifically, we consider (1) whether the agency relationship between Mr. Charlton and Defendant RFI was sufficiently akin to an employer-employee relationship such that *respondeat superior* would apply and (2) if so, whether Mr. Charlton was acting within the scope of that relationship at the time of the accident.

A. Nature of Agency Relationship

Under the doctrine of *respondeat superior*, a principal may be held vicariously liable for the torts of his agent. Our Supreme Court has held as a general rule that *respondeat superior* applies if the agent's relationship with his principal is akin to an employee rather than that of an independent contractor. *See Cooper v. Asheville Citizen-Times Pub. Co.*, 258 N.C. 578, 586-87, 129 S.E.2d 107, 113-14 (1963). Our task, here, is *not* to determine whether Defendant RFI should be treated as Mr. Charlton's employer for payroll tax purposes or in determining the applicability of the Workers Compensation Act. Rather, our task is to determine whether Defendant RFI should be treated as Mr. Charlton's employer for purposes of holding Defendant RFI vicariously liable for the torts committed by Mr. Charlton.

Our Supreme Court instructs that whether an agent is akin to an employee or is akin to an independent contractor "depends on the *degree*

of control retained by the principal over the details of the work as it is being performed [by the agent]." *Vaughn v. N.C. Dep't of Human Res.*, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979) (emphasis added); *see also Gammons v. N.C. Dep't of Human Res.*, 344 N.C. 51, 56-7, 472 S.E.2d 722, 725-26 (1996). One acts as an independent contractor where he is not accountable to his employer as to *the manner* in which he performs his work, but is only accountable "as to *the result* of his work." *Cooper*, 258 N.C. at 588, 129 S.E.2d at 114 (emphasis added).

Our Supreme Court instructs that the "vital test" in classifying whether a worker acts as an employee does not depend on whether his principal actually controls his work but whether his principal "*has retained the right of control or superintendence* over the contractor or employee as to details" of the performance of his work. *Hayes v. Bd. of Trs. Of Elon Coll.*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944) (emphasis added). "[I]t is immaterial whether [the principal] actually exercises [his right of control]," so long as he has retained the right to do so. *Cooper*, 258 N.C. at 587, 129 S.E. at 113; *see also Gammon*s, 344 N.C. at 57, 472 S.E.2d at 726 ("The controlling principal is that vicarious liability arises from *the right* of supervision and control." (emphasis added)).

And our Supreme Court instructs that an independent contractor may still be deemed an employee, for purposes of *respondent superior*, as to *some of the work* performed by him, if that principal exercises a sufficient degree of control as to *that portion of the work*.[3]

In conclusion, our Supreme Court's jurisprudence suggests that we are to determine the extent that Defendant RFI had the right to control Mr. Charlton's work with respect to Mr. Charlton's care of Mr. Smith.

Whether vicarious liability applies in a given agency relationship is "a mixed question of fact and law." *Beach v. McLean*, 219 N.C. 521, 525, 14 S.E.2d 515, 518 (1941). But where the facts are essentially established, then the issue is purely a question of law. *Id.* As we have held:

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3. *See, e.g.*, *State v. Wilson*, 362 N.C. 162, 165, 655 S.E.2d 359, 361 (2008) (recognizing that "an independent contractor can, in certain respects, be an [employee] depending upon the degree of control exercised by the principal"); *Holcomb v. Colonial Assoc., L.L.C.*, 358 N.C. 501, 509-10, 597 S.E.2d 710, 716 (2004) (recognizing that a landlord who hired an independent contractor to manage its residential property may still be vicariously liable for dogs allowed by the contractor where the landlord had authority to actively control the presence of pets); *Gammons*, 344 N.C. at 63, 472 S.E.2d at 729 (holding that "regarding the provision of child protective services, there exists a sufficient agency relationship between [the State] and [the County] such that the doctrine of *respondeat superior* is implicated, [and therefore the State] may be liable [for negligent acts of the County] while acting within the scope of their obligation [to provide child protective services]").

> Where the facts are undisputed or the evidence is susceptible of only a single inference and a single conclusion, it is a question of law for the court whether one is an employee or an independent contractor, but it is only where a single inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the court.

Little v. Poole, 11 N.C. App. 597, 600, 182 S.E.2d 206, 208 (1971).

We have reviewed the contract between Mr. Charlton and Defendant RFI (the "Contract") and the other evidence in the record. For the reasons stated below, we conclude that Mr. Charlton was an "employee" of Defendant RFI in his care of Mr. Smith for purposes of *respondeat superior*.[4] In reviewing the evidence that was before the trial court at summary judgment, we are guided by the cases cited above and by the eight factors considered by our Supreme Court in *Hayes v. Board of Trustees of Elon College* in determining whether one acts as an employee or as an independent contractor; namely, whether:

> [t]he person employed
>
> (a) is engaged in an independent business, calling, or occupation;
>
> (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work;
>
> (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;
>
> (d) is not subject to discharge because he adopts one method of doing the work rather than another;
>
> (e) is not in the regular employ of the other contracting party;
>
> (f) is free to use such assistants as he may think proper;
>
> (g) has full control over such assistants; and
>
> (h) selects his own time.

Hayes, 224 N.C. at 16, 29 S.E.2d at 140.

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4. We note that the Contract does state that Mr. Charlton was not an employee of Defendant RFI for purposes of benefits, payroll taxes, or workers compensation. But the names assigned by the parties are not conclusive as to whether Defendant RFI had the right to control the manner in which Mr. Charlton performed his caregiver duties, thereby exposing Defendant RFI to vicarious liability for the negligent acts of Mr. Charlton in the performance of his caregiving duties on Defendant RFI's behalf.

We are further guided by our Court's opinion in *Rhoney v. Fele*, in which we analyzed whether a registered nurse was an employee of a nurse staffing agency at the time the nurse was involved in a fatal car accident. *Rhoney v. Fele*, 134 N.C. App. 614, 518 S.E.2d 536 (1999). In *Rhoney*, the staffing agency recruited nurses to work at medical facilities short-term. *Rhoney*, 134 N.C. App. at 615, 518 S.E.2d at 538. If a facility needed a nurse for a particular shift, it would call the agency who would provide a nurse from the agency's pool. *Id.* On one occasion, the agency contacted the defendant nurse who agreed to work a shift at a particular hospital. *Id.* While driving to the hospital, the nurse was involved in an automobile accident which killed an individual. *Id.* The deceased's estate brought suit against both the nurse and the agency. *Id.*

Relying on many of the Supreme Court's opinions cited above, our Court held that the nurse was an independent contractor. *Id.* at 618-19, 518 S.E.2d at 540. In the analysis, our Court cited a number of factors which supported a finding that the nurse was an independent contractor: (1) as a registered nurse, he was engaged in an independent profession; (2) he was free to provide nursing services to others outside his arrangement with the agency; (3) he exercised his duties at the assigned hospital, free from supervision from the agency; (4) his work was sporadic, rather than regular; (5) he was free to reject job assignments offered by the agency; and (6) the agency did not provide him with valuable equipment. *Id.*

Our Court also cited factors which supported a finding that the nurse was an employee: (1) he was paid an hourly rate, rather than a lump sum for a particular assignment; (2) he was not free to select his assistants; (3) he was not able to choose unilaterally when he would perform his assigned tasks; (4) the agency was paid directly by the hospital for his services, who in turn would pay him; (5) the agency could terminate its relationship with him at any time; and (6) the agency provided a work packet and directions to the site for each assignment. *Id.*

Our Court weighed the factors, "bearing in mind the admonition of *Gordon* and *Hayes* that the key factor is 'control,' " and concluded that the nurse was an independent contractor:

> These factors demonstrate that while [the agency] exercised control over extraneous aspects of [the nurse's] work, such as dates and times when work was offered and collection of his salary, [the agency] exercised no control over [the nurse's] nursing, the function for which hospitals sought him. To the contrary, [the nurse] was a free

> agent who could and did maintain similar arrangements with other suppliers of medical personnel . . . . Once [he] accepted work proposed by [the agency], [the nurse] was not under any control by [the agency] while working . . . . Thus, [the agency's] role was similar to that of a broker or middleman.

Id.

The facts in the present case are *similar* to the facts of *Rhoney*, but they are not "on all fours." Bearing in mind that the key factor is "control," for the reasons stated below, we conclude that Defendant RFI exerted much more control over Mr. Charlton than the agency exerted over the nurse in *Rhoney*. Specifically, the evidence shows that while Mr. Charlton was experienced in providing caregiving services to disabled clients, Defendant RFI was more than just a broker or middleman who placed caregivers with such clients.

According to the Contract, Defendant RFI had the right to monitor and supervise Mr. Charlton in his work and to exercise some control over *the manner* in which Mr. Charlton provided his caregiving services. The Contract suggests that Mr. Charlton was required to provide caregiving services to whichever clients Defendant RFI decided to place with him and that Defendant RFI had the right to control and plan the type of caregiving services which Mr. Charlton provided to Mr. Smith:

> [Mr. Charlton shall] provide all services to each placed client described in the contact [sic] in accordance with the approved habilitation plan for each client, as such plan may change from time to time. [Mr. Charlton shall] notify [the qualified professional supervising him] when the schedule of services changes for any reason. [Mr. Charlton shall] participate in the review and changing of the plan as needed to meet the needs of the client. [Mr. Charlton shall] not provide services for payment that [Defendant RFI] is not approved to provide.

Further, Mr. Charlton was required to participate in consultations with Defendant RFI regarding his care of clients. Mr. Charlton was not allowed to use restraints on a client who was acting unruly; he could only use "restrictive interventions" as approved by Defendant RFI, and he was required to notify Defendant RFI if he determined in his judgment that it was necessary to use emergency rights restrictions. Defendant RFI even controlled the manner in which Mr. Charlton drove his vehicle when transporting clients, limiting his speed to five miles per hour below the

speed limit. We note, though, that there was evidence of an independent contractor relationship; for example, Mr. Charlton was free to hire others to help him carry out his caregiving duties.

According to their Contract, Defendant RFI controlled Mr. Charlton's ability to accept clients on his own; that is, Mr. Charlton was generally required to work with only Defendant RFI clients. Specifically, the Contract provided that Mr. Charlton shall "not accept clients from another agency while housing clients from [Defendant RFI]." The evidence shows that Mr. Charlton did house clients of Defendant RFI and did not work with clients outside of those assigned to him by Defendant RFI.

Also, unlike the nurse in *Rhoney* whose work with the agency "was sporadic rather than regular," *Rhoney*, 134 N.C. App. at 619, 518 S.E.2d at 540, the evidence here shows that Mr. Charlton's work with Mr. Smith was regular. He worked forty (40) hours each week, a typical full work week, providing direct caregiving services to Mr. Smith. It is true that Defendant RFI did not have absolute control over the specific hours Mr. Charlton had to work each week. *See Youngblood v. N. State Ford Truck Sales*, 321 N.C. 380, 385, 364 S.E.2d 433, 438 (1988) (recognizing that a requirement that a worker perform his work during a set time is indicative of an employer-employee relationship). But there was evidence that Mr. Charlton could not unilaterally choose when to provide his forty (40) hours of service either, but that he needed to do so to fit the needs of Mr. Smith, and that he generally worked with Mr. Smith during regular day-time working hours.

According to their Contract, Mr. Charlton was paid hourly, rather than by the job, a strong indication of an employer-employee relationship. *See Id*. at 384, 364 S.E.2d at 437-38 (stating that "payment by a unit of time, such as an hour, day, or week, is strong evidence that [the worker] is an employee").

Regarding the transportation services Mr. Charlton provided to Mr. Smith, we note that Defendant RFI did not provide Mr. Charlton with a vehicle to transport clients, a factor which suggests an independent contractor relationship. However, there were other factors which suggest an employment relationship, including that (1) Mr. Charlton was required to drive clients to certain events as requested by the client and as otherwise required by the plan of services that Defendant RFI required Mr. Charlton to provide; (2) Defendant RFI had the right to inspect Mr. Charlton's vehicle that he used to transport clients; and (3) Defendant RFI controlled the manner in which Mr. Charlton operated

his vehicle, for instance, requiring that he not drive faster than five miles per hour below the speed limit.

Our Supreme Court has held that "[t]he right to fire is one of the most effective means of control" and that "[a]n independent contractor is subject to discharge only for cause and not because he adopts one method of work over another[,]" whereas "[a]n employee, on the other hand, may be discharged without cause at any time." *Youngblood*, 321 N.C. at 385, 364 S.E.2d at 438. Here, Defendant RFI did not have the absolute right to terminate the Contract without cause, but the Contract did provide that Defendant RFI had the right to terminate the Contract "immediately without notice" if it "reasonably determines that the life, health, safety or property of the client is threatened or at risk." Implicit in this provision is the right of Defendant RFI to terminate the Contract if Mr. Charlton provided caregiving services in a manner which violates the Contract but which otherwise complies with law.

Though not controlling, we are persuaded by guidance provided by the U.S. Department of Labor, Wage and Hour Division. Specifically, on 13 July 2018, the Department issued a bulletin to guide whether to treat "caregiver registries" as employers of the caregiver.[5] For instance, the Bulletin informs that where a registry merely conducts more than just basic background checks, but rather conducts additional subjective screening, an employer-employee relationship is indicated. Here, the Contract suggests that Defendant RFI engages in subjective screening beyond basic background checks in placing caregivers with clients based on their respective "culture, age, gender, sexual orientation, spiritual beliefs, socioeconomic status and language" expecting the caregiver to "hold[] the same values [of inclusivity]."

The Bulletin provides that where the client controls the hiring/firing of the caregiver, an independent contractor relationship is indicated. But where the registry plays a more active role and can fire a caregiver for not meeting certain standards, an employer-employee relationship is indicated. Here, Defendant RFI does have some control to terminate Mr. Charlton.

The Bulletin provides that a registry which exercises "control over the caregiver's work schedules and assignments may indicate that the

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5. Wage and Hour Division, *Field Assistance Bulletin No. 2018-4: Determining whether nurse or caregiver registries are employers of the caregiver*, U.S. Dep't of Labor (13 July 2018) https://www.dol.gov/whd/FieldBulletins/fab2018_4.htm.

registry is an employer[.]" Here, Defendant RFI did have the right to exercise control over assignments and the number of hours Mr. Charlton was to work.

The Bulletin states that for the caregiver to be considered an independent contractor, the registry may not "instruct caregivers how to provide caregiving services, monitor or supervise caregivers in clients' homes, or evaluate caregivers' performance." And further, "[c]ontrol over the caregiver services indicates that the registry is an employer of the caregiver." Here, though, as outlined above, Defendant RFI had control over how Mr. Charlton provided care.

The Bulletin states that a registry, in an independent contractor relationship, "does not determine a caregiver's rate of pay." The Bulletin recognizes that the registry is not deemed to set pay where Medicaid or another government program determines the hourly rate. The evidence, here, suggests that Mr. Charlton's pay was based largely on the rate allowed by the government, and therefore, is indicative of an independent contractor relationship. However, the Bulletin also recognizes that where the registry makes money for each hour worked by the caregiver, rather than simply from an upfront fee for making the placement, the registry acts like an employer, as is the case here. Also, the Bulletin states that where the registry pays the caregiver directly, the registry acts as an employer, as is the case here.

The Bulletin provides that a registry acts as an employer when it tracks and verifies the number of hours worked by the caregiver, which is again the case here.

The Bulletin provides that a registry that provides equipment and supplies to a caregiver acts as an employee. However, here, this factor cuts against an employer-employee relationship.

Finally, the Bulletin states that "[c]alling a caregiver an 'independent contractor' or issuing him or her an IRS 1099 form," as Defendant RFI does here, "does not preclude the caregiver from being an employee [under the Fair Labor Standards Act.]"

In conclusion, there are factors which suggest an employer-employee relationship, for purposes of *respondeat superior*, and there are factors which suggest an independent contractor relationship. However, as stated above, Defendant RFI acted as more than just a passive middleman who placed Mr. Charlton with clients: Defendant RFI retained the right to prescribe the type of services and to regulate the manner in which they were provided; and Defendant RFI retained the right

to supervise and monitor Mr. Charlton as he provided these services. Therefore, we conclude that Defendant RFI could be held vicariously liable for the torts of Mr. Charlton that he might have committed while providing services to clients of Defendant RFI under their Contract.[6]

B. Course of the Agency Relationship

Our conclusion that Mr. Charlton was, as a matter of law, an employee of Defendant RFI for the purposes of *respondeat superior* does not fully answer whether *respondeat superior* applies in this particular case. Rather, whether, as a matter of law, Mr. Charlton was acting in the scope of his employment with Defendant RFI *at the time of the accident* is not an issue that either party has raised in this appeal. The trial court never reached this issue, having concluded that Mr. Charlton was an independent contractor. And neither party briefed this issue in this appeal. Therefore, we decline to consider the issue in this appeal.

IV. Conclusion

We conclude that Defendant RFI was not entitled to summary judgment on the issue of its vicarious liability for Mr. Charlton's alleged negligence. Defendant RFI, per the terms of the Contract, had the authority to exercise sufficient control over Mr. Charlton in his performance of caregiving services to deem Mr. Charlton an employee for purposes of *respondeat superior*. We cannot say, however, that Mr. Charlton was entitled to summary judgment on the issue of vicarious liability: Whether Mr. Charlton was acting within the scope of his contract with Defendant RFI at the time of the accident is not an issue that is before us. We, therefore, vacate the trial court's grant of summary judgment and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and DAVIS concur.

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6. Defendant RFI argues that it would be inappropriate for partial summary judgment to be entered for Plaintiff on the agency issue, as Plaintiff never moved for summary judgment. However, Rule 56 allows for summary judgment to be entered against the moving party where appropriate. N.C. R. Civ. P. 56.

REA v. REA

[262 N.C. App. 421 (2018)]

ROBIN LYNN REA, PLAINTIFF
v.
KATHLEEN OLIVER REA, DEFENDANT

No. COA18-95

Filed 20 November 2018

1. Divorce—alimony—findings of fact—foster children, marital misconduct, retirement income, and reasonable expenses

In an alimony case, the trial court's findings of fact on issues related to foster children, marital misconduct, retirement income, and reasonable expenses were supported by competent evidence.

2. Divorce—alimony—duration—statutory factors—discretion

The trial court did not abuse its discretion in granting 10.5 years of alimony to a wife where it properly considered the required factors of N.C.G.S. § 50-16.3A(b), made findings of fact regarding the relevant factors, and exercised its discretion.

Judge MURPHY concurring in part and dissenting in part.

Appeal by plaintiff from order entered 31 July 2017 by Judge Christopher B. McLendon in District Court, Washington County. Heard in the Court of Appeals 19 September 2018.

Miller & Audino, LLP, by Jay Anthony Audino, for plaintiff-appellant.

Pritchett & Burch, PLLC, by Lloyd C. Smith, III, for defendant-appellee.

STROUD, Judge.

Plaintiff-husband appeals the trial court's order awarding alimony to defendant-wife. Because the trial court's findings of fact are supported by the evidence, the conclusions of law are supported by those findings, and the trial court did not abuse its discretion in setting the alimony term and duration, we affirm.

I. Background

In 1999, plaintiff Husband and defendant Wife were married; they separated on 8 August of 2014. On 21 August 2014, Husband filed a

verified complaint for equitable distribution and a motion for a temporary restraining order and injunctive relief alleging Wife was removing antiques and other personal property from the former marital home and should be enjoined from such malfeasance. On 3 September 2014, Wife answered Husband's complaint, denying allegations of wrongdoing and counterclaiming for postseparation support, permanent alimony, equitable distribution, and attorney fees. On 2 October 2014, Husband filed a verified reply to Wife's answer and counterclaims and alleged that Wife "committed acts of marital misconduct[;]" Husband characterized the wrongdoing as financial in nature.

On 2 February 2015, the trial court entered an order for postseparation support requiring Husband to pay Wife $2,000 a month. On 25 July 2016, the trial court entered a judgment and order on equitable distribution; this order was not appealed. On 16 September 2016, the trial court entered a Qualified Domestic Relations Order ("QDRO") which was also not appealed.

The trial court held a hearing on Wife's alimony claim on 9 September 2016 and on 31 July 2017, the trial court entered an order awarding Wife alimony and attorney fees. The trial court determined Husband had committed acts of martial misconduct, including illicit sexual behavior. Husband was ordered to pay wife $2,780 per month for 10.5 years and attorney fees. Husband timely filed notice of appeal.

II. Alimony Order

Husband challenges findings of fact made by the trial court and the trial court's ultimate determination of the amount and term of alimony.

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Dechkovskaia v. Dechkovskaia, 232 N.C. App. 350, 356, 754 S.E.2d 831, 836 (2014) (citations omitted).

A. Findings of Fact

[1] Husband challenges nine findings of fact as unsupported by competent evidence; we first consider each of the nine challenged findings of fact.

1. Foster Children

The trial court found in finding of fact 7 that "[d]uring the marriage the parties[] provided foster care to numerous children, and as of the date of separation, the parties w[]ere the primary caretakers and sole financial provider for two minor children, both of who[m] have remained with the [Wife], who has been solely responsible for their financial care." Husband argues this finding is not supported by the evidence because the evidence actually showed that the children's father cares for them on weekends and they receive Medicaid for medical expenses, so Wife is not "*solely* responsible" for the children. (Emphasis added.) Wife responds that the parties had taken in about fifteen foster children at various times during their marriage, including the two children still living with Wife as of the date of separation. Wife testified they had taken full financial responsibility for them, including providing uninsured medical costs if the children's biological father allowed Medicaid to lapse. Since the parties separated, Wife had been solely responsible for the children; in other words, Husband had not been assisting financially with the foster children as he did while the parties were together.

Husband misconstrues this finding as saying that Wife receives absolutely no assistance from any other source in supporting the children. But the trial court was not addressing all of the financial circumstances of the foster children in this order; it was addressing the financial situation of Husband and Wife. Husband's argument ignores the first part of the finding, which is that prior to their separation, *he and Wife* were the "sole financial provider" for the children, but after the separation, Wife had been the sole provider. Further, the evidence showed that since Husband and Wife separated, Wife has been caring for the children without Husband's involvement or financial assistance, so the finding is supported by competent evidence. Even if the wording of finding 7 could have been more exact, the meaning is clear. *See, e.g.*, *In re S.W.*, 175 N.C. App. 719, 723, 625 S.E.2d 594, 597 (2006) ("A review of the record reveals that there is competent evidence to support findings of fact numbers 4, 6 through 17 and 19 as these findings of fact are admitted to in respondent's answer, if not in exact form, at least in substance."). This argument is overruled.

2. Marital Misconduct

Husband next challenges finding of fact 11(a) and (b) which address his marital misconduct:

> 11. Plaintiff has committed acts of marital misconduct, which include the following:
>
> a. Plaintiff engaged in acts of illicit sexual behavior prior to the parties separation. Plaintiff had the inclination and opportunity and had in fact committed adultery with [Sue Smith].[1]
>
> b. Prior to the parties' separation, Plaintiff offered indignities that rendered Defendant's condition intolerable and her life burdensome, due to him acting on his adulterous relationship and Defendant becoming aware of that adultery prior to separation. Specifically, Defendant found Plaintiff kissing [Sue Smith] in a parked vehicle in Greenville prior to separation.

Husband argues there was not sufficient evidence to support finding 11 because there was not definitive proof he engaged in any type of sexual activity with Ms. Smith. Husband contends that the evidence of his inclination and opportunity to commit illicit sexual behavior with Ms. Smith or offer indignities was not sufficient and evidence of his behavior and statements during the marriage which Wife interpreted as indications of his infidelity, are not sufficient. Husband characterizes the evidence as "[c]ar rides and phone calls" that "can only rise to the level of mere conjecture[.]" Husband specifically argues there is no direct evidence of "sexual intercourse, sexual acts, or sexual contact."

It is well-established that direct evidence of illicit sexual behavior or indignities as a result of that behavior is not required but can be shown by circumstantial evidence:

> Where adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations.

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1. We have used a pseudonym to protect the privacy of the woman.

> Thus, if a plaintiff can show opportunity and inclination, it follows that such evidence will tend to support a conclusion that more than mere conjecture exists to prove sexual intercourse by the parties.

Coachman v. Gould, 122 N.C. App. 443, 447, 470 S.E.2d 560, 563 (1996) (citation and quotation marks omitted).

The evidence at trial included a private investigator ("PI") who testified that on 6 August, before separation, she witnessed and photographed Husband kissing Ms. Smith. The investigative report, admitted as an exhibit, shows that the investigator parked near Husband's truck in the parking lot of a shopping mall at 1:09 p.m. and waited until 3:45 p.m., when Husband and Ms. Smith arrived, and Ms. Smith parked her car next to Husband's truck. Husband and Ms. Smith kissed. Husband then got into his own truck, and both vehicles left at the same time. Thereafter, on 18 and 19 August, two nights in a row only ten days after the parties' separation, the PI saw Husband's and Ms. Smith's vehicles parked overnight at a hotel. Although the overnight stays at the hotel were shortly after the parties separated, "[n]othing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation[.]" N.C. Gen. Stat. § 50-16.3A(b)(1) (2015).

Furthermore, Wife testified that prior to their separation Husband began to repeat specific suspicious behaviors he exhibited in 2011 when he had a prior affair; these actions prompted her to hire the PI. For example, Husband failed to come home one night. Wife also saw Husband and Ms. Smith together, including at Husband's temporary residence, shortly after the date of separation, and when Wife confronted the Husband about the other woman, he said, "she was a better woman than" Wife. We conclude there was competent evidence to support finding of fact 11(a) and (b). This argument is overruled.

3. Retirement Income

Defendant next challenges finding of fact 16 which states, "The Plaintiff has significant funds upon which he can enjoy upon retirement based on Plaintiff's employment. The Defendant has little to no independent source of retirement income, but did receive a portion of the Plaintiff's retirement in the Order for Equitable Distribution." Husband contends there was no evidence of the value of his retirement account before the trial court "at the time of the trial." But Husband testified quite extensively about his 401K account, including the large sums he

had removed from the account. Husband does not dispute that Wife had no retirement savings other than the portion of Husband's retirement she received in their equitable distribution. The trial court did not find an exact amount of Husband's retirement but rather noted the funds were "significant" due to his income and continuing contributions. The trial court found uncontested, and thus binding, that Husband's monthly income was $10,471.94 while Wife's monthly income was $2,772.08. *See generally Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). While there was some confusion around how much Husband currently deposits to his 401K, he does make deposits which his employer matches. The trial court need not find a specific value for the parties' retirement accounts for purposes of alimony. Finding 16 is simply a comparison of "[t]he relative assets and liabilities of the spouses" as required under North Carolina General Statute § 50-16.3A(b)(10). N.C. Gen. Stat. § 50-16.3A(b)(10) (2015). There was competent evidence to support finding 16, so this argument is overruled.

4. Reasonable Expenses

Husband next contests two findings of fact determining the parties' reasonable expenses and relative financial needs.

a. Husband's Expenses

Husband specifically contests that his reasonable expenses are $1,675.00 because his financial affidavit alleged a higher sum. Husband argues that the trial court accepted Wife's expenses as stated on her financial affidavit but did not accept his. But the trial court can accept or reject the alleged expenses on any financial affidavit, based upon its evaluation of the credibility of the evidence and the reasonableness of the expenses alleged. *See Burger v. Burger*, ___ N.C. App. ___, ___ 790 S.E.2d 683, 687 (2016) ("This Court has long recognized that the determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." (citation, quotation marks, and brackets omitted)). There was extensive testimony about the expenses, and during the hearing, Husband's attorney agreed Husband's recurring monthly expenses were $1,675.00. The trial court has discretion to determine reasonable expenses. *See generally Kelly v. Kelly*, 167 N.C. App. 437, 445, 606 S.E.2d 364, 370 (2004) (noting trial court has discretion to determine reasonable expenses). Findings of fact 18(a)(i) and 19 were supported by competent evidence. This argument is overruled.

b. Wife's Expenses

Husband next contests the findings that Wife's reasonable expenses are $5,745.84 a month. Husband makes separate arguments as to the determination of Wife's reasonable expenses. Husband first takes issue with the trial court relying on Wife's financial affidavit for its calculations noting various bits of testimony about various individual expenses and contending that the trial court should have found lower amounts than those stated on Wife's affidavit. During trial, the trial court thoroughly considered Wife's financial affidavit as evidence of her reasonable expenses and needs; the affidavit is competent evidence. *See Parsons v. Parsons*, 231 N.C. App. 397, 399, 752 S.E.2d 530, 533 (2013) ("Plaintiff primarily contends that the trial court's findings of fact on defendant's expenses were erroneous because the financial affidavit presented by defendant, on which the trial court largely based its findings regarding defendant's income and expenses, was unsupported by other evidence. Plaintiff fails to recognize that the affidavit itself is evidence of defendant's expenses.")

Husband next contends that "reasonable expenses" and "relative financial needs" cannot be the same number -- here, both were $5,745.84 -- although he cites no authority for this contention. Under North Carolina General Statute § 50-16.3A(b)(13), the trial court must consider "[t]he relative needs of the spouses[.]" N.C. Gen. Stat. § 50-16.3A(b)(13) (2015). The term "relative" is an adjective describing "needs of the spouses[.]" *Id.* In the context of North Carolina General Statute § 50-16.3A(b), the term "relative" is used simply to direct a comparison of the expenses of the husband and the wife.[2] We see no reason the "relative financial need" of Wife must differ from her "reasonable expenses." Instead, in most cases, the terms "relative financial need" and "reasonable expenses" probably will be the same. The trial court's calculation of Wife's need for alimony is clear, whether the number is called "reasonable expenses" or "relative financial needs":

Wife's expenses (or "relative financial needs")	$5745.84
Wife's income	-$2772.08
Deficit (alimony award)	$2973.76

2. In addition to the "relative needs of the spouses," North Carolina General Statute § 50-16.3A(b) also requires the trial court to consider "[t]he relative earnings and earning capacities of the spouses;" "[t]he relative education of the spouses[;]" and "[t]he relative assets and liabilities of the spouses and the relative debt service requirements of the spouses[.]" N.C. Gen. Stat. § 50-16.3A(b) (2015).

The meaning of the trial court's finding is clear, and the evidence supports the amounts stated in the findings of fact. This argument is overruled.

Husband also contends Wife's expenses for foster children, grandchildren, and nieces and nephews are not reasonable expenses because Wife has no legal financial obligation for the foster children or her relatives in the same manner as a parent would have a legal obligation to support her own child. But the question here is not Wife's legal obligation to support the children; it is the parties' accustomed standard of living during the marriage as our Supreme Court has established that the accustomed standard of living is based upon the parties' lifestyle during the marriage and not just economic survival:

> We think usage of the term accustomed standard of living of the parties completes the contemplated legislative meaning of maintenance and support. The latter phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. For us to hold otherwise would be to completely ignore the plain language of G.S. 50-16.5 and the need to construe our alimony statutes *in pari materia*. This we are unwilling to do.

Williams v. Williams, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980).

The evidence showed that "the economic standard established by the marital partnership for the family unit during the years the marital contract was intact" included caring for about fifteen foster children over the years as well as generosity to relatives. *Id.* For some families, the "economic standard[,]" *id.*, and lifestyle established during the marriage includes expenses for golf, vacations, boats, hobbies, and entertainment, and these types of expenses can be included as part of the reasonable expenses for purposes of alimony. *See, e.g.*, *Rhew v. Felton*, 178 N.C. App. 475, 484, 631 S.E.2d 859, 865–66 (2006). For example, in *Rhew*, this Court determined the trial court properly considered evidence of the parties' "standard of living" during the marriage, which included frequent travel and "major vacations" to "Canada, New Orleans, Hawaii and Cancun; ["a boat they "used regularly[;]" contributions to their church; playing golf; "arts, crafts and making jewelry[;]"

going "out every Friday evening[;]" going dancing and to movies; going out to "lunch every Sunday[;]" entertaining friends in their home; and engaging "the services of a housekeeper." *Id.* Here, instead of pursuing expensive leisure activities, Husband and Wife established a lifestyle of caring for foster children; this economic choice is certainly worth at least the same consideration as golf and vacations. The trial court did not abuse its discretion by including these expenses in Wife's needs. The arguments as to Wife's reasonable expenses are overruled.

5. Monthly Surplus

Husband also challenges the determination that he has a monthly surplus of $8,796.94. Since we have already determined the underlying findings of fact were supported by competent evidence, this number is simply the mathematical result of those findings, so we need not address this argument further. This argument is overruled.

B. Alimony Amount and Duration

[2] Husband next contends that the trial court erred in setting alimony, but his only argument is again challenging the same findings of fact, and thus we need not re-address those issues. Husband then challenges the trial court's determination that he has the ability to pay alimony and the duration of the alimony. Again, the findings of fact based on competent evidence show that Husband has $8,796.94 of excess income so he has the ability to pay in alimony. Lastly, Husband contends the trial court did not make adequate findings of fact to support the duration of alimony for 126 months.

North Carolina General Statute § 50-16.3A(b) sets out the factors the trial court should use to determine the "Amount and Duration" of alimony:

> The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:
>
> (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;

(2) The relative earnings and earning capacities of the spouses;

(3) The ages and the physical, mental, and emotional conditions of the spouses;

(4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;

(5) The duration of the marriage;

(6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;

(7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;

(8) The standard of living of the spouses established during the marriage;

(9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;

(10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;

(11) The property brought to the marriage by either spouse;

(12) The contribution of a spouse as homemaker;

(13) The relative needs of the spouses;

(14) The federal, State, and local tax ramifications of the alimony award;

(15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.

(16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

N.C. Gen. Stat. § 50-16.3A(b) (2015).

Finding of Fact 5 states:

> The Court has considered the financial needs of the parties, the accustomed standard of living of the parties prior to their separation, the present employment income and other recurring earnings of the parties from any source, the income earning abilities of the parties, the separate and marital debt service obligations of the parties, those expenses reasonably necessary to support each of the parties, and each parties' respective legal obligation to support any other person.

But the trial court did not simply recite that it had considered this list of factors; it made findings of fact regarding the relevant factors. *See* N.C. Gen. Stat. § 50A-16.3(b-c) (2015) (noting findings of fact are shall be made for factors for which evidence was presented). Other findings in the order, including findings we have not quoted in this opinion because they were not challenged by Husband, specifically address many of these factors in detail, including marital misconduct; the relative earnings and earning capacities of the parties; the duration of the marriage; the good health and ages of the parties; the standard of living established during the marriage; the relative assets and liabilities of the parties; and the relative needs of the parties. The trial court properly considered the required factors and set the duration of the alimony in its discretion. We discern no abuse of discretion in the trial court granting 10.5 years of alimony. *See Hartsell v. Hartsell*, 189 N.C. App. 65, 75, 657 S.E.2d 724, 730 (2008) ("N.C. Gen. Stat. § 50–16.3A(b) (2007) directs that the court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. Decisions about the amount and duration of alimony are made in the trial court's discretion, and the court is not required to make findings about the weight and credibility it assigned to evidence before it." (citations and quotation marks omitted)). This argument is overruled.

III. Conclusion

We conclude competent evidence supports the findings of fact and the trial court did not abuse its discretion in awarding alimony of $2,780 for a term of 126 months.

AFFIRMED.

Judge ZACHARY concurs.

Judge MURPHY concurs in part and dissents in part in a separate opinion.

MURPHY, Judge, concurs in part and dissents in part.

I concur in the portions of the Majority's opinion concluding that the trial court's findings of fact in the alimony order relating to (1) the foster children, (2) Husband's retirement income, (3) the parties' reasonable expenses and relative financial needs, and (4) Husband's monthly income surplus were supported by competent evidence. However, I respectfully dissent from the Majority's determination that the trial court's finding of fact of Husband's marital misconduct was supported by competent evidence and that the trial court made adequate findings of fact as to the duration of alimony.

A. Marital Misconduct

Regarding Husband's marital misconduct, the trial court made the following findings of fact:

> A. Plaintiff engaged in acts of illicit sexual behavior prior to the parties' separation. Plaintiff had the inclination and opportunity and had in fact committed adultery with [Sue Smith].
>
> B. Prior to the parties' separation, Plaintiff offered indignities that rendered Defendant's condition intolerable and her life burdensome, due to him acting on his adulterous relationship and Defendant becoming aware of that adultery prior to separation. Specifically, Defendant found Plaintiff kissing [Sue Smith] in a parked vehicle in Greenville prior to separation.

Marital misconduct of either spouse is a relevant factor the trial court must consider in determining the amount, duration, and manner of alimony payment. N.C.G.S. § 50-16.3A(b)(1) (2017). There are several enumerated acts which constitute "marital misconduct" within the meaning of N.C.G.S. § 50-16.3A(b)(1), including illicit sexual behavior and "[i]ndignities rendering the condition of the other spouse intolerable and life burdensome." N.C.G.S. § 50-16.1A(3) (2017).

1. Illicit Sexual Behavior

Illicit sexual behavior is defined as "acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in

G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse." N.C.G.S. § 50-16.1A(3)(a) (2017). As the Majority notes, direct evidence is not required for a spouse to show illicit sexual behavior. "Where adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; *and* (2) the opportunity created to satisfy their mutual adulterous inclinations." *In re Estate of Trogdon*, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991) (internal citations omitted) (emphasis added). Inclination and opportunity are to be considered separately, and a showing of inclination will not remedy a failure to show sufficient opportunity. *See Coachman v. Gould*, 122 N.C. App. 443, 447, 470 S.E.2d 560, 563-64 (1996). The Majority does not clearly delineate this distinction, which is crucial to the determination of whether there was competent evidence to support a finding of illicit sexual behavior in this case.

The evidence introduced at trial tended to show that a private investigator ("PI") hired by Wife observed Husband's vehicle in the parking lot of a mall on 6 August 2014. While conducting surveillance on Husband's vehicle, the PI witnessed Husband arrive in another vehicle with Sue Smith and lean over to kiss her. Husband admitted that, prior to the kiss, he and Sue Smith "went to the theater [and] got something to eat[,]" after which he left to work a 12-hour shift. The only other interaction between Husband and Sue Smith introduced as evidence of illicit sexual behavior occurred after separation, when the PI witnessed Husband and Sue Smith's vehicles in a Holiday Inn parking lot overnight.

I agree with the Majority that, based on the kiss in the parking lot on 6 August, it was not an abuse of discretion for the trial court to find that Husband had the inclination to engage in sexual intercourse or sexual acts with Sue Smith within the meaning of N.C.G.S. § 50-16.1A(3)(a). However, this is not competent evidence to support a finding that Husband had the opportunity to engage in sexual intercourse or acts. Our caselaw has held that car rides and kisses in public do not demonstrate specific opportunities for sexual intercourse or acts. In *Coachman v. Gould*, we held that "telephone calls and a car ride are not the type of 'opportunities' for sexual intercourse intended under the *Trogdon* analysis." 122 N.C. App. at 447, 470 S.E.2d at 563. We specifically noted that the "only evidence of…social contact" between the wife and her alleged lover was the husband finding his wife leaving with the alleged lover in an automobile. *Id.* at 445, 470 S.E.2d at 562. Additionally, in *Oakley v. Oakley*, 54 N.C. App. 161, 282 S.E.2d 589 (1981), we held that "evidence

hardly establishes a case for adultery" where a spouse and his or her alleged lover "were seen together on occasion" and "once kissed…on the cheek." *Id.* at 163, 282 S.E.2d at 590. The evidence presented here that Husband rode in a vehicle with Sue Smith and the two shared a kiss in public falls within our caselaw holding similar evidence insufficient to show opportunity.

Wife and the Majority contend additional pre-separation evidence from which opportunity could be inferred was shown through her testimony that Husband did not come home from work "one night" in July 2014. However, when asked about that night, Wife could not remember which night it was. *See generally Coachman*, 122 N.C. App. at 445, 470 S.E.2d at 562 ("Plaintiff was unable to establish the date on which this purported rendezvous occurred . . . ."). Husband also later testified that he was working nights at that time in 2014. This "amounts to no more than mere conjecture" of opportunity and not competent evidence of such. *Id.* at 447, 470 S.E.2d at 563.

The evidence that Husband and Sue Smith's vehicles were in the parking lot of a hotel overnight serves only a corroborative purpose, as they occurred after the date of Husband and Wife's separation. N.C.G.S. § 50-16.3A(b)(1) ("Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation.") Thus, this evidence is not to be used independently as evidence that Husband had an opportunity to engage in sexual intercourse or acts with Sue Smith. In order for this evidence to be considered as corroborative, there must be *independent pre-separation evidence* for it to corroborate, which is lacking here. Evidence of a car ride in a public place is insufficient to show opportunity. The Majority fails to show any other pre-separation evidence from which the trial court could find opportunity. Accordingly, there was not competent evidence to support the trial court's finding of illicit sexual behavior.

2. Indignities

"Our courts have declined to specifically define 'indignities,' preferring instead to examine the facts on a case by case basis. Indignities consist of a course of conduct or repeated treatment over a period of time including behavior such as unmerited reproach, studied neglect, abusive language, and other manifestations of settled hate and estrangement." *Evans v. Evans*, 169 N.C. App. 358, 363-64, 610 S.E.2d 264, 269 (2005). Indeed, the repeated nature of the indignities is the fundamental

characteristic of indignities, and we have found error where indignities were found based on one occasion or act. *See Traywick v. Traywick*, 28 N.C. App. 291, 295, 221 S.E.2d 85, 88 (1976).

The trial court did not base its finding of indignities on a course of conduct or repeated treatment over a period of time. Rather, it based its finding of indignities on one incident: "*Specifically*, Defendant found Plaintiff kissing [Sue Smith] in a parked vehicle in Greenville prior to separation." (emphasis added). While unfortunate for the parties involved, this *one act* is insufficient to support a finding of indignities, as it is not a course of conduct or repeated treatment that would render the condition of Wife intolerable and her life burdensome. The trial court therefore abused its discretion in finding that Husband offered indignities.

B. Alimony Duration

While I concur with the Majority's determination that competent evidence supported the trial court's finding that Husband had the ability to pay alimony, the trial court did not make made adequate findings to support the duration of its alimony award.

The trial court is to "exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term." N.C.G.S § 50-16.3A(b) (2017). "Decisions about the amount and duration of alimony are made in the trial court's discretion, and the court is not required to make findings about the weight and credibility it assigned to evidence before it." *Hartsell v. Hartsell*, 189 N.C. App. 65, 75, 657 S.E.2d 724, 730 (2008). However, when awarding alimony, trial courts are required to "set forth the reasons for the amount of the alimony award, its duration, and manner of payment." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522 (2003). In *Squires v. Squires*, we remanded "for further findings of fact concerning the duration of the alimony award" where the trial court did not make any findings regarding the reason for the duration it imposed. *Squires v. Squires*, 178 N.C. App. 251, 264, 631 S.E.2d 156, 163 (2006).

While the Majority is correct that the determination of the duration of the payment of alimony is within the discretion of the trial court, this discretion does not free the trial court from its duty to make findings regarding the basis for the duration set. The trial court made no such finding to explain its rationale for the duration of the award. Accordingly, our caselaw "mandate[s] that we remand for further findings of fact regarding the basis for the amount and duration of the alimony award . . . ." *Hartsell*, 189 N.C. App. at 76-77, 657 S.E.2d at 731.

C. Conclusion

Under these facts, there was not competent evidence to support a finding that Husband committed acts of marital misconduct. Because the trial court considered the marital misconduct in its determination of the amount, duration, and manner of alimony payment and was required to order alimony upon its finding of Husband's illicit sexual behavior, I would remand the trial court's order for a new hearing on alimony with the additional instruction, if alimony is still ordered, to make adequate findings regarding the duration of the award. I respectfully dissent.

JOHN TYLER ROUTTEN, Plaintiff
v.
KELLY GEORGENE ROUTTEN, Defendant

No. COA17-1360

Filed 20 November 2018

1. Appeal and Error—notice of appeal—order appealed—omission—waiver

In a custody case, defendant mother's arguments that the trial court exceeded its authority under Civil Procedure Rule 35 by ordering her to submit to a psychological examination were waived and dismissed for failure to include in her notice of appeal the relevant order of the trial court.

2. Child Visitation—noncustodial parent—discretion given to custodial parent—improper delegation of authority

In a custody case, the trial court improperly delegated authority to the custodial parent to determine, in his discretion, the amount of visitation the noncustodial parent could exercise with her children.

3. Child Visitation—electronic—telephone calls—supplement to visitation

In a custody case remanded for other reasons, the Court of Appeals instructed the trial court that if it allowed defendant mother to have visitation with her children, electronic visitation in the form of telephone calls or other electronic contact may be ordered only as a supplement, not as a replacement, to defendant's visitation rights.

4. Constitutional Law—protected status as parent—denial of custody and visitation—necessary findings—unfit or acted inconsistently with protected rights

In a custody case, the trial court failed to make the necessary findings of fact that defendant mother was unfit or had acted inconsistently with her constitutionally protected status as a parent before denying her all custodial and visitation rights to her children.

5. Child Custody and Support—findings of fact—sufficiency of evidence

In a custody case, the trial court's numerous findings of fact were based on competent evidence consisting of testimony from both parties, neighbors, and medical professionals.

6. Appeal and Error—waiver—not raised below—temporary custody review—due process argument

In a custody case, defendant mother's argument that the trial court violated her due process rights by conducting a temporary custody review in the judge's chambers and not in open court were waived and dismissed where defendant's counsel did not object to the review being held in chambers, the trial court did not alter the custody arrangement already in place, and defendant did not raise the procedural due process issue in her Rule 59 and 60 motions to set aside the permanent custody order.

7. Child Custody and Support—evidence—domestic violence—consideration by trial court

The Court of Appeals rejected defendant mother's contention that the trial court failed to consider evidence of domestic violence perpetrated by plaintiff father before making its custody determination, where the trial court made findings regarding altercations between the parties and those findings were supported by competent evidence.

8. Divorce—alimony—amount and duration—statutory factors

In a divorce and custody action, the trial court did not abuse its discretion in awarding defendant mother alimony calculated from the parties' date of separation and not the date of divorce, nor in denying defendant's claim for attorney fees, where its unchallenged findings of fact referenced the required statutory factors contained in N.C.G.S. § 50-16.3A.

9. Child Custody and Support—pro se motions—amended by counsel—original motions voluntarily dismissed

In a custody case, the Court of Appeals rejected defendant mother's argument that the trial court should have considered her pro se Rule 59 and 60 motions rather than the amended motions subsequently filed by her attorney, where defendant's own counsel took voluntary dismissal of the pro se motions and defendant did not voice any disagreement for that action, nor did she advance any authority for her arguments on appeal.

Judge BERGER concurring with separate opinion.

Judge INMAN concurring in part and dissenting in part with separate opinion.

Appeal by defendant from orders entered by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 20 September 2018.

Jill Schnabel Jackson for plaintiff-appellee.

R. Daniel Gibson for defendant-appellant.

TYSON, Judge.

Kelly Georgene Routten ("Defendant") appeals from orders entered on 4 April 2017 and several other interim and temporary orders. We affirm in part, vacate in part, and remand.

I. Background

John Tyler Routten ("Plaintiff") and Defendant were married on 23 March 2002 and separated from each other on 26 July 2014. Their union produced two children, a daughter and a son. The daughter, "Hanna," was born 2 June 2004. The son, "Billy," was born 17 July 2012.

On 21 July 2014, Plaintiff allegedly assaulted Defendant by pushing her onto the floor of their home. Defendant was granted an *ex parte* domestic violence protective order ("DVPO") against Plaintiff and was granted temporary custody of the parties' children on 25 July 2014. On 4 August 2014, Plaintiff filed a complaint ("the Complaint") against Defendant for child custody, equitable distribution, and a motion for psychiatric evaluation and psychological testing.

On 13 August 2014, Defendant voluntarily dismissed the DVPO. That same day the parties entered into a memorandum of judgment/order, which established a temporary custody schedule for the children and a temporary child support and post-separation support arrangement. Defendant purportedly did not receive a copy of the Complaint until after she had dismissed the DVPO and signed the memorandum of judgment/order. Defendant filed her answer to the Complaint on 6 October 2014 and asserted several counterclaims, including claims for alimony, child custody, child support, and attorney's fees. The parties participated in mediation and the trial court entered an equitable distribution order by consent of the parties on 29 April 2015.

On 21 September 2015, trial began on the parties' claims for permanent child custody, permanent child support, and Defendant's counterclaims for alimony and attorney's fees. At the conclusion of the trial on 24 September, the trial judge indicated Defendant needed to submit to a neuropsychological evaluation before he could decide permanent child custody.

On 21 December 2015, the trial court entered a custody and child support order, which established a temporary custody arrangement and ordered Defendant to "take whatever steps are necessary to obtain a complete neuropsychological evaluation no later than June 15, 2016." The 21 December 2015 order also provided that "[t]his case shall be set for a 3-hour custody review hearing on April 5, 2016" and "for a 6.5-hour subsequent hearing for review of custody and entry of final/permanent orders in July or August of 2016, once those calendars are available for scheduling trial dates." On 5 April 2016, the trial court conducted an in-chambers conference with the parties' counsel to determine the status of Defendant's neuropsychological evaluation.

On 27 April 2016, the trial court entered an order scheduling a three-hour hearing on 4 August 2018 to hear evidence relating to Defendant's neuropsychological evaluation and evidence relating to the best interests of the children. The 27 April 2016 order also decreed:

> 2. Defendant shall take whatever steps are necessary to obtain a complete neuropsychological evaluation no later than June 15, 2016. . . .
>
> 3. Defendant shall notify Plaintiff's counsel in writing no later than May 15, 2016, of the name and address of the provider who shall perform the neuropsychological evaluation of Defendant.

> 4. Any written report resulting from the neuropsychological evaluation shall be produced to Plaintiff's counsel no later than ten (10) days prior to August 4th, 2016. . . .

On 29 July 2016, Defendant filed a motion for a continuance and protective order in which she alleged that she had complied with the trial court's prior orders to obtain a neuropsychological evaluation. Defendant's 29 July 2016 motion was mailed to Plaintiff's counsel five days prior to the scheduled 4 August 2016 final custody hearing. The motion did not contain the date the neuropsychological evaluation was performed or the name and address of the provider who had performed the evaluation.

The final custody hearing took place on 4 August 2016. At the outset of the hearing, Defendant's trial counsel disclosed for the first time that Duke Clinical Neuropsychology Service had performed a neuropsychological evaluation of Defendant on 21 April 2016. During the hearing, Defendant admitted: (1) she had not disclosed to Plaintiff's counsel the 21 April 2016 evaluation by Duke prior to the 4 August 2016 hearing; (2) she had notified Plaintiff's counsel that Pinehurst Neuropsychology, not Duke, would perform the evaluation; and (3) she had filed motions in June and July 2016 suggesting that a neuropsychological evaluation had not yet been performed.

At the conclusion of the hearing, the trial court transferred sole physical custody of the children to Plaintiff pursuant to a memorandum of order/judgment until a complete permanent custody order could be drafted and entered. The trial court entered a permanent child custody order on 9 December 2016 and an order for alimony and attorney's fees. On 9 and 13 December 2016, Defendant filed *pro se* motions for a new trial and relief from judgment pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure.

Following a series of subpoenas filed by Defendant following the trial court's final custody hearing on 4 August 2016, Plaintiff filed a motion for a temporary restraining order and preliminary injunction on 13 December 2016. Plaintiff's motion asserted, in part:

> 17. The subpoenas issued by Defendant seek the production of documents related to child custody issues. Child custody has been fully litigated and there are no hearings scheduled (or motions pending) that relate to child custody.

> 18. Defendant is representing herself pro se and appears to be using the subpoena process through the clerk's office to (improperly) attempt to continue litigating a claim that has been fully and finally litigated.

The trial court granted Plaintiff a temporary restraining order on 13 December 2016. The trial court conducted a hearing on Plaintiff's preliminary injunction motion on 3 January 2017. At the hearing, the trial court ordered Defendant to calendar her pending Rule 59 and 60 motions within ten days for the next available court dates. Defendant calendared the hearing for the Rule 59 and 60 motions for 1 March 2017. On 25 January 2017, the trial court entered an order granting Plaintiff's preliminary injunction. The trial court's order decreed, in relevant part: "Defendant is hereby restrained and prohibited from requesting issuance of a subpoena in this action by the Wake County Clerk of Superior Court or by any court personnel other than the assigned family court judge."

On 20 February 2017, Defendant filed amended Rule 59 and Rule 60 motions. The trial court concluded Defendant was entitled to the entry of a new order containing additional findings of fact and conclusions of law. On 6 March 2017, the trial court entered an amended permanent child custody order ("the Amended Order"). The Amended Order, in part, granted Plaintiff sole legal custody and physical custody, denied Defendant visitation with the children, but allowed Plaintiff to "permit custodial time between the children and Defendant within his sole discretion" and allowed Defendant two telephone calls per week with the children.

Defendant appeals the trial court's Amended Order and several other "related interim or temporary orders and ancillary orders."

We note Defendant initially chose to prosecute her appeal *pro se*. This Court provided the opportunity for this case to be included in the North Carolina Appellate Pro Bono Program. Following this Court's inquiry, Defendant accepted representation by a *pro bono* attorney under this Program. Upon Defendant's acceptance of *pro bono* representation, this Court ordered the parties to file supplemental briefs by order dated 23 August 2018.

II. Jurisdiction

Jurisdiction lies in this Court over an appeal of a final judgment regarding child custody in a civil district court action pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) (2017) and 50-19.1 (2017).

III. Standard of Review

In a child custody case, the standard of review is "whether there was competent evidence to support the trial court's findings of fact[.]" *Barker v. Barker*, 228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)) (citations omitted). "Whether [the trial court's] findings of fact support [its] conclusions of law is reviewable *de novo*." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (alteration in original) (citation omitted).

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Davis v. Kelly*, 147 N.C. App. 102, 106, 554 S.E.2d 402, 405 (2001) (citation omitted).

IV. Issues

On appeal, Defendant contends: (1) the trial court abused its discretion by ordering Defendant to submit to a neuropsychological evaluation; (2) the trial court abused its discretion by delegating its authority to determine Defendant's visitation rights to Plaintiff; (3) the trial court infringed Defendant's constitutionally protected parental rights by awarding sole custody and visitation rights to Plaintiff; (4) the trial court violated N.C. Gen. Stat. § 50-13.2(e)(3) (2017) by only granting Defendant telephone visitation; (5) the trial court entered numerous findings not supported by competent evidence; (6) the trial court infringed Defendant's procedural due process rights; (7) the trial court abused its discretion in calculating the amount of alimony; (8) the trial court abused its discretion in denying her claim for attorney's fees; and (9) the trial court abused its discretion with respect to her originally filed Rule 59 motion and three contempt motions at a hearing on 1 March 2017.

V. Analysis

A. *Neuropsychological Evaluation*

[1] Defendant argues the trial court exceeded its authority under Rule 35 of the North Carolina Rules of Civil Procedure by ordering her to submit to a neuropsychological evaluation by a non-physician. Rule 35 states that a court "may order [a] party to submit to a physical or mental examination by a physician" when that party's physical or mental condition is in controversy. N.C. Gen. Stat. § 1A-1, Rule 35 (2017). In Defendant's *pro se* briefs, she does not refer to a specific order she asserts was erroneously entered. In Defendant's supplemental *pro bono* brief, she specifically argues the trial court erred, or abused its discretion, by entering an order on 3 October 2014 requiring her to submit to an examination by a neuropsychologist.

The trial court's 3 October 2014 order required both parties to submit to *psychological*, not *neuropsychological*, evaluations by Dr. Kuzyszyn-Jones. Defendant did not include the 3 October 2014 order in her notice of appeal listing the various orders of the trial court she appealed from. "Proper notice of appeal is a jurisdiction requirement that may not be waived." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). "[T]he appellate court obtains jurisdiction only over the ruling specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Id.* Defendant's arguments concerning the requirement of the 3 October 2014 order to obtain a psychological evaluation by Dr. Kuzyszyn-Jones are waived and dismissed. *See id.*; N.C. R. App. P. 3(d).

B. *Father's Discretion over Visitation*

[2] Defendant also argues the trial court violated the statute and abused its discretion by granting Plaintiff the sole authority to "permit custodial time between the children and Defendant" in the Amended Order. Under N.C. Gen. Stat. § 50-13.1(a), "custody" includes "custody or visitation or both." N.C. Gen. Stat. § 50-13.1(a) (2017).

The trial court's Amended Order concluded "It is not in the children's best interests to have visitation with Defendant." The Amended Order then provides:

> 2. Physical Custody. The minor children shall reside with Plaintiff. *Plaintiff may permit custodial time between the children and Defendant within his sole discretion*, taking into account the recommendations of [Hanna's]

> counselor as to frequency, location, duration, and any other restrictions deemed appropriate by the counselor for *permitting visitation between [Hanna] and [Defendant]*. (Emphasis supplied).

Defendant cites *In re Stancil*, 10 N.C. App. 545, 179 S.E.2d 844 (1971), in support of her argument. *Stancil* involved a custody dispute between a child's mother and the paternal grandmother. *Id.* at 546-47, 179 S.E.2d at 845-46. In the trial court's custody award to the grandmother, it granted the grandmother "the right to determine the times, places and conditions under which she could visit with [the child]." *Id.* at 550, 179 S.E.2d at 848. This Court stated:

> When the question of visitation rights of a parent arises, the court should determine from the evidence presented whether the parent by some conduct has forfeited the right or whether the exercise of the right would be detrimental to the best interest and welfare of the child. If the court finds that the parent has by conduct forfeited the right or *if the court finds that the exercise of the right would be detrimental to the best interest and welfare of the child*, the court may, in its discretion, deny a parent the right of visitation with, or access to, his or her child; *but the court may not delegate this authority to the custodian.*

Id. at 552, 179 S.E.2d at 849 (emphasis supplied). Here, although the trial court had determined, without finding Defendant had forfeited her parental visitation rights, that it was "not in the children's best interests to have visitation with Defendant." The trial court contradicted its finding and conclusion, the above rule stated in *Stancil*, and delegated its judicial authority to Plaintiff to determine Defendant's visitation. As with the trial court in *Stancil*, the trial court delegated the determination of Defendant's visitation with her children to Plaintiff, at "his sole discretion." The trial court erred and abused its discretion by delegating the determination of Defendant's visitation rights with her children to Plaintiff. *Id.* The trial court cannot delegate its judicial authority to award or deny Defendant's visitation rights to Plaintiff or a third-party. *See id.*; *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985) ("[T]he award of visitation rights is a judicial function, which the trial court may not delegate to a third-party" (internal quotation marks and citation omitted)).

The decretal portion of the Amended Order is vacated and the matter remanded for the trial court to determine an appropriate custodial

and visitation schedule consistent with this Court's opinion in *Stancil*. *See Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849.

C. *Electronic Visitation*

[3] Defendant also argues the trial court abused its discretion by allowing her only electronic "visitation," specifically, two telephone calls per week with the children. Defendant raises her electronic visitation arguments for the first time on appeal. Based upon our holding to vacate the custodial and visitation schedule from the Amended Order and remand for additional findings and conclusions, it is unnecessary to address the merits of Defendant's arguments concerning electronic visitation.

However, the trial court is instructed on remand that: "electronic communication with a minor child may be used to supplement visitation with the child. Electronic communication *may not* be used as a replacement or substitution for custody or visitation." N.C. Gen. Stat. § 50-13.2(e) (2017) (emphasis supplied).

"Electronic communication" is defined as "contact, other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies by Internet, or other medium of communication." *Id*. If on remand, the trial court does not determine Defendant is unfit or engaged in conduct inconsistent with her parental rights, the trial court may only order electronic visitation as a supplement to Defendant's visitation rights and not as a replacement for Defendant's visitation rights. *See id.*; *In re T.R.T.*, 225 N.C. App. 567, 573-74, 737 S.E.2d 823, 828 (2013).

D. *Constitutionally Protected Status as Parent*

[4] Defendant contends the trial court violated her constitutionally protected interest as parent by awarding sole legal and physical custody of the children to Plaintiff without making a finding that she was unfit or had acted inconsistently with her constitutionally protected status as parent. We agree.

The Amended Order purported to deny Defendant all custody and visitation with her children, effectively terminating her parental rights.

The Supreme Court of North Carolina held in *Owenby v. Young*, that:

> [T]he Due Process Clause of the Fourteenth Amendment ensures that the government does not impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child. [*Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001)

> (citing *Troxel v. Granville*, 530 U.S. 57, 72-73, 147 L. Ed. 2d 49, 61 (2000))]. Until, and unless, the movant establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status, the "best interest of the child" test is simply not implicated. In other words, the trial court may employ the "best interest of the child" test only when the movant first shows, by clear and convincing evidence, that the natural parent has forfeited his or her constitutionally protected status.

357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003). Our Supreme Court also recognized in *Price v. Howard*, that:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.

346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). Each parent's constitutional rights are equal and individually protected. *See id.*; *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 519 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

Before denying a parent all custodial and visitation rights with his or her children, the trial court: (1) must first make a written finding that the parent was unfit or had engaged in conduct inconsistent with his protected status as a parent, before applying the best interests of the child test; and (2) make these findings based upon clear, cogent, and convincing evidence. *Moore v. Moore*, 160 N.C. App. 569, 573-74, 584 S.E.2d 74, 76 (2003); *see Petersen v. Rogers*, 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994) ("[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.").

Based upon the trial court's failure to find Defendant is either unfit or has acted inconsistently with her constitutionally protected status as a parent, we vacate the trial court's conclusions of law and custody portions of its order. If on remand, the trial court purports to deny Defendant all custody and visitation or contact with her children, the trial court must make the constitutionally required findings based upon

clear, cogent, and convincing evidence. *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268; *Moore*, 160 N.C. App. at 573-74, 584 S.E.2d at 76.

The dissenting opinion claims this holding "diverges from established precedent" and "recognizes a new constitutional right" citing *Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014). However, the dissenting opinion either overlooks or disregards the precedents set by the Supreme Court of the United States, the Supreme Court of North Carolina, and this Court, including *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

E. *In re Civil Penalty*

The Supreme Court of North Carolina issued a decision in *Lanier, Comr. of Insurance v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968). Subsequently, this Court interpreted the holding of *Lanier* in *N.C. Private Protective Servs. Bd. v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E.2d 135 (1987). A later decision from this Court found *Gray* had "contradict[ed] the express language, rationale and result of *Lanier*," and refused to follow that decision. *In re Civil Penalty*, 92 N.C. App. 1, 13-14, 373 S.E.2d 572, 579 (1988). Upon review, the Supreme Court concluded "that the effect of the majority's decision . . . was to overrule *Gray*," and rejected this Court's attempt to do so. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *Id.*

This sequence of events in *In re Civil Penalty* is precisely what happened after this Court's unanimous decision in *Moore*. The Supreme Court issued a decision in *Owenby*, holding that "[u]ntil, and unless, the movant establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status, the 'best interest of the child' test is simply not implicated." *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268. The Court's unanimous decision in *Moore*, applied that precise result, holding: "[o]nce conduct that is inconsistent with a parent's protected status is proven, the 'best interest of the child' test is applied." 160 N.C. App. at 573, 587 S.E.2d at 76. No further appellate review of *Moore* occurred.

As occurred *In re Civil Penalty*, "[s]everal pages of the [*Respess*] opinion were devoted to a detailed rejection of the [*Moore*] panel's interpretation of [*Owenby*]." *In re Civil Penalty*, 324 N.C. at 383-84, 379 S.E.2d at 36. The panel in *Respess* violated our Supreme Court's holding of *In re Civil Penalty* when it refused to follow the unanimous binding

ten-year precedent set forth in *Moore*. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37; *Respess*, 232 N.C. App. at 624-25, 754 S.E.2d at 700-01.

Further, numerous other precedential cases, also decided prior to *Respess*, have cited to *Moore* for the holding at issue, contrary to the assertion in the dissenting opinion. *See*, *e.g.*, *Woodring v. Woodring*, 227 N.C. App. 638, 644, 745 S.E.2d 13, 19 (2013) ("In the absence of extraordinary circumstances, a parent should not be denied the right of visitation." (quoting *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76)); *Maxwell v. Maxwell*, 212 N.C. App. 614, 622-23, 713 S.E.2d 489, 495 (2011) ("we reverse and remand this matter for further findings of fact as to Plaintiff's fitness as a parent or the best interest of the minor children" (citing *Moore*, 160 N.C. App. at 574, 587 S.E.2d at 77)); *Slawek v. Slawek*, No. COA09-1682, 2010 WL 3220668, at *6 n.4 (N.C. Ct. App. Aug. 17, 2010) (unpublished) ("To declare a parent unfit for visitation, there must be 'clear, cogent, and convincing evidence.' " (quoting *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76)); *Mooney v. Mooney*, No. COA08-998, 2009 WL 1383395, at *5 (N.C. Ct. App. May 19, 2009) (unpublished) ("A trial court may only deny visitation under the 'best interest' prong of N.C.G.S. § 50-13.5(i) '[o]nce conduct that is inconsistent with a parent's protected status is proven.' " (quoting *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76)); *In re E.T.*, No. COA05-752, 2006 WL 389731, at *3 (N.C. Ct. App. Feb. 21, 2006) (unpublished) ("The trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child." (quoting *Moore*, 160 N.C. App. at 572, 587 S.E.2d at 76)); *In re M.C.*, No. COA03-661, 2004 WL 2152188, at *4 (N.C. Ct. App. Sep. 21, 2004) (unpublished) ("The trial court is required to make a finding that a natural parent is unfit before denying custody to that parent." (citing *Moore*, 160 N.C. App. 569, 587 S.E.2d 74)); *David N. v. Jason N.*, 164 N.C. App. 687, 690, 596 S.E.2d 266, 268 (2004) ("The trial court is required to make a finding that a natural parent is unfit before denying custody to that parent." (citing *Moore*, 160 N.C. App. 569, 587 S.E.2d 74)), *rev'd on other grounds*, 359 N.C. 303, 608 S.E.2d 751 (2005).

In *Peters v. Pennington*, this Court cited *Moore*, as follows:

> In *Moore*, this Court stated that the prohibition of *all* contact with a natural parent's child was analogous to a termination of parental rights. The Court reasoned that, in order to sustain a 'total prohibition of visitation or contact' based on the unfitness prong of N.C. Gen. Stat. § 50-13.5(i), the

> trial court must find unfitness based on the clear, cogent, and convincing evidentiary standard that is applicable in termination of parental rights cases.

210 N.C. App. at 19, 707 S.E.2d at 737 (emphasis in original) (citing *Moore*, 160 N.C. App at 573-74, 587 S.E.2d at 76-77)).

Our Supreme Court has not overturned any of this Court's published opinions listed above, including *Moore*, which protect the "constitutionally-protected paramount right" of each individual parent over the care, custody, and control of their children. *See Petersen*, 337 N.C. at 403-404, 445 S.E.2d at 905. The dissenting opinion does not address or distinguish any of these binding precedents upon this Court.

Were we to disregard each parent's individually protected constitutional right, the following scenario may arise: an unmarried couple conceives a child. The couple becomes estranged before the child is born, and the father never knows the mother was pregnant. Years later, after the child is born, the father learns of his child's existence and seeks to have a relationship with the child. The father files an action to seek custody or visitation with his child. Under *Respess*, the trial court could then deny the father any custody or visitation solely using the "best interests" test, without any findings of the father's unfitness or actions inconsistent with his parental status. The application of the "best interests" test under this scenario, without findings of unfitness or actions inconsistent, would be wholly incompatible with our precedents, which have recognized: "A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child[.]" *Price*, 346 N.C. at 79, 484 S.E.2d at 534; *see Quilloin*, 434 U.S. at 255, 54 L. Ed. 2d at 519 ("the relationship between parent and child is constitutionally protected"); *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268; *Moore*, 160 N.C. App. at 574, 587 S.E.2d at 77.

The dissenting opinion, and *Respess*, assert this Court's holding in *Moore* was in conflict with *Owenby*. Citing the precedents of the Supreme Court of the United States and the Supreme Court of North Carolina, this Court unanimously stated in *Moore*:

> It is presumed that fit parents act in the best interest of their children. *Troxel*, 530 U.S. at 69, 147 L. Ed. 2d at 59. A parent's right to a relationship with his child is constitutionally protected. *See Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 519 (1978). Once conduct that is inconsistent with a parent's protected status is proven, the

> "best interest of the child" test is applied. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

Moore, 160 N.C. App. at 573, 587 S.E.2d at 76.

This Court's application of the rule regarding each parent's constitutionally protected individual relationship of custody or visitation with her child in this case and in *Moore* is fully consistent with binding precedents and with our Supreme Court's holding in *Owenby*. "[T]he trial court may employ the 'best interest of the child' test only when the movant first shows, by clear and convincing evidence, that the natural parent has forfeited his or her constitutionally protected status." *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268.

This opinion fully quotes and is consistent with the holding in *Owenby* and does not "conspicuously omit[]" any binding language therein, contrary to the dissenting opinion's assertion. *See id.*

F. *Trial Court's Findings of Fact*

[5] Defendant argues the Amended Order contains numerous findings of fact which are not supported by competent evidence, and the findings of fact do not support the trial court's conclusions of law.

"Our trial courts are vested with broad discretion in child custody matters." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). Where substantial evidence in the record supports the trial court's findings of fact, those findings are conclusive on appeal, even if record evidence might sustain findings to the contrary. *Id.* at 475, 586 S.E.2d at 254 (citation omitted).

Here, the trial court made fifty-two findings of fact in its Amended Order. Defendant challenges over twenty of the findings of fact made by the trial court concerning Defendant's behavior, Defendant's misleading statements to Plaintiff's counsel and the trial court regarding her neuropsychological evaluation, Defendant's health, Defendant's relationship with Plaintiff, Defendant's relationship with the children, and the best interests of the children.

After careful review of the whole record, we conclude the trial court's findings of fact are based upon competent evidence in the record, including the testimony of the Plaintiff; the parties' former neighbors, Jennifer and Jared Ober; Dr. Kuzyszyn-Jones; Defendant's neurologist, Dr. Mark Skeen; and Defendant's own testimony from the September 2015 hearing and the 4 August 2016 hearing. Defendant's arguments are overruled.

Defendant also argues the trial court's conclusions of law are not supported by the findings of fact. Based upon our holding to vacate the trial court's conclusions of law for the reasons stated above in sections B and D, it is unnecessary to address these arguments.

G. *Denial of Procedural Due Process Rights*

[6] Defendant also argues the trial court infringed her constitutional rights to procedural due process by conducting a temporary custody review on 5 April 2016 to determine the status of Defendant's obligation to complete the neuropsychological evaluation. This custody review was conducted in the trial judge's chambers, and not in open court.

Both Plaintiff's counsel and Defendant's counsel were present for this temporary custody review. The trial court did not enter an order based upon this temporary custody review that altered the custody arrangement specified in the 21 December 2015 temporary custody and child support order. Following the 5 April 2016 custody review hearing, the trial court entered an order setting specific guidelines for when Defendant should complete the neuropsychological evaluation ordered by the trial court on 21 December 2015. As a result of the temporary custody review on 5 April 2016, the trial court only ordered that the permanent custody review hearing take place on 4 August 2016 and reiterated Defendant's obligation under the 5 December 2015 order to obtain a neuropsychological evaluation. Defendant's trial counsel offered no objection to the trial court holding the in-chambers custody review meeting. "A contention not raised in the trial court may not be raised for the first time on appeal." *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002) (citations omitted).

Defendant also did not raise her procedural due process arguments in her amended Rule 59 and Rule 60 motions to set aside the trial court's permanent custody order. *Id.* ("We note that defendant did not raise this issue in his motion to set aside the judgment. The record does not reflect a ruling on this issue by the trial court"); N.C. R. App. P. 10(a)(1). These arguments are waived and dismissed.

H. *Domestic Violence*

[7] Defendant also contends the trial court failed to consider evidence of domestic violence perpetrated by Plaintiff in making its custody determination in the Amended Order. N.C. Gen. Stat. § 50-13.2(a) (2017) provides, in relevant part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such

> person . . . as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party.

The Amended Order indicates it did consider Defendant's allegations of domestic violence by Plaintiff. Finding of fact 24 states:

> There was significant conflict between the parties during their marriage, which culminated in physical altercations between the parties on more than one occasion. Defendant testified at length about these altercations during the September 2015 trial and described herself as a victim of domestic violence, but Plaintiff introduced a recording into evidence at the September 2015 trial in which Defendant can be heard laughing and attempting to goad Plaintiff into a physical altercation. There were two incidents in July of 2014 (shortly before the parties separated) during which Plaintiff attempted to retreat from Defendant during an argument by locking himself in another room but Defendant forced her way into the room. Furthermore, Defendant's medical records (as introduced into evidence by Defendant and/or made available to Plaintiff's counsel for cross-examination purposes at the September 2015 trial) are inconsistent with her testimony about the alleged altercations.

This finding of fact was supported by substantial competent evidence of Plaintiff's testimony and the audio recording referenced therein, which was admitted into evidence. Additionally, finding of fact 24 in the Amended Order is the same as finding of fact 22 in the initial permanent custody order. Defendant did not raise the issue of the trial court's purported failure to consider domestic violence in her amended Rule 59 and 60 motions. Defendant had a full opportunity to assert the trial court failed to consider domestic violence at the 1 March 2017 hearing on her Rule 59 and 60 motions, but failed to do so. *See Creasman* 152 N.C. App. at 123, 566 S.E.2d at 728; N.C. R. App. P. 10(a)(1). Defendant may disagree with the weight and credibility the trial court gave the evidence, but the record clearly establishes the trial court considered the allegations of domestic violence in determining custody pursuant to N.C. Gen. Stat. § 50-13.2(a). Defendant's argument is overruled.

I. *Alimony and Attorney's Fees*

[8] Defendant next argues the trial court abused its discretion with regard to the Alimony and Attorney Fee Order entered by the trial court on 9 December 2016, the same day the trial court entered its initial permanent custody order. Defendant argues the trial court erred by awarding her alimony for a duration calculated from the parties' date of separation and not from the parties' date of divorce. "Decisions concerning the amount and duration of alimony are entrusted to the trial court's discretion and will not be disturbed absent a showing that the trial court has abused such discretion." *Robinson v. Robinson*, 210 N.C. App. 319, 326, 707 S.E.2d 785, 791 (2011).

The trial court is required to consider the sixteen factors enumerated in N.C. Gen. Stat. § 50-16.3A(b) in deciding to award alimony. N.C. Gen. Stat. § 50-16.3A(c) ("[T]he court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor."). "[T]he award of . . . attorney's fees in matters of child custody and support, as well as alimony . . . is within the discretion of the trial court." *McKinney v. McKinney*, 228 N.C. App. 300, 307, 745 S.E.2d 356, 361 (2013).

Here, the trial court made several specific and unchallenged findings of fact with reference to attorney's fees and the required statutory factors for determining alimony. Defendant does not challenge any of these findings of fact or argue that these findings are not supported by competent evidence in the record. Defendant has failed to show the trial court abused its discretion in calculating the amount of alimony awarded or by denying Defendant's claim for attorney's fees. Defendant's arguments are overruled.

J. *1 March 2017 Hearing*

[9] Defendant attempts to argue the trial court erred with respect to actions taken by her own attorney at a hearing on 1 March 2017. This hearing was held on several motions filed by Defendant. After the trial court entered its original permanent child custody order and its order on alimony and attorney's fees on 9 December 2016, Defendant subsequently filed a *pro se* Rule 59 motion on 16 December and a *pro se* Rule 60 motion on 19 December.

Defendant obtained new counsel, who then filed amended Rule 59 and Rule 60 motions on 20 February 2017. These motions were heard by the trial court on 1 March 2017, in addition to three *pro se* contempt motions Defendant had previously filed.

At the outset of the 1 March 2017 hearing, Defendant's counsel stated to the trial court that the contempt motions "are right now being written up in a voluntarily dismissal to be dismissed with prejudice as of today." The trial court then proceeded to hear Defendant's amended Rule 59 and Rule 60 motions. The trial court granted Defendant's Rule 59 motion and later entered the Amended Order on 6 March 2017.

Defendant appears to argue the trial court should have considered her original *pro se* Rule 59 motion instead of the amended motion filed by her attorney. Defendant asserts her contempt motions should not have been dismissed on 1 March 2017. These motions were voluntarily dismissed by Defendant's own counsel and not by the trial court. Defendant was present for the 1 March 2017 hearing and did not voice any disagreement to the trial court over her counsel's voluntary dismissal of the contempt motions. Defendant cites no authority to support these arguments. Defendant fails to establish any error on the trial court's part with respect to the Rule 59 motion and the voluntary dismissal of her contempt motions. These arguments are dismissed.

VI. Conclusion

The trial court erred and abused its discretion by delegating its authority to determine Defendant's visitation rights to Plaintiff and by effectively terminating Defendant's parental rights without first making a finding of unfitness or acts inconsistent with her constitutionally protected status by clear, cogent, and convincing evidence, and violated the statute by limiting her access to her children to telephone calls only. *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268; *Moore*, 160 N.C. App. at 573-74, 584 S.E.2d at 76; N.C. Gen. Stat. § 50-13.2(e).

Defendant has failed to show the trial court abused its discretion in calculating the amount of alimony, or in denying her claim for attorney's fees. Defendant has failed to preserve her arguments concerning the trial court's ordering of a neuropsychological evaluation and the trial court's purported violations of her procedural due process rights. Defendant's remaining arguments are overruled and dismissed for failures to object and preserve.

The Alimony Order and Attorney Fees Order are affirmed. The trial court's conclusions of law and decretal portions of its Amended Order are vacated and remanded for further proceedings as consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge BERGER concurs with separate opinion.

Judge INMAN concurs in part, dissents in part, with separate opinion.

BERGER, Judge, concurring.

I fully concur in the majority opinion, but write separately to address a trend in this Court's jurisprudence that has troubling implications.

In the last few years, this Court increasingly has overruled precedent on the ground that a case, although published and otherwise controlling, itself failed to follow an even earlier Court of Appeals or Supreme Court case.[1]

At first glance, this approach might seem appropriate. After all, *In re Civil Penalty* tells us that one panel cannot overrule another on the same issue. 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). If it appears a second panel did precisely that by refusing to follow the precedent set by the first panel, should the third panel faced with the issue not ignore the second and follow the first? But, what if a fourth panel comes along and concludes that the second panel properly distinguished or limited the first panel? That fourth panel could refuse to follow the third panel on the ground that it improperly overruled the second.

This may sound more like a law school hypothetical than a real-world problem, but it is very real. As the case before us here demonstrates, this Court can be trapped in a chaotic loop as different panels disagree, not only on the interpretation of the law, but also on what law appropriately controls the issue.

This problem is compounded by the reality that we are an intermediate appellate court that sits in panels. Ordinarily, the doctrine of *stare decisis* will prevent appellate courts from casually tossing away precedent decided just a few years (or even months) earlier.[2] But that

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1. Here are a few examples: *State v. Alonzo*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA17-1186, 2018 WL 3977546, at *2 (Aug. 21, 2018), *temporary stay allowed*, ___ N.C. ___, 817 S.E.2d 733 (2018); *State v. Jones*, ___ N.C. App. ___, ___, 802 S.E.2d 518, 523 (2017); *State v. Mostafavi*, ___ N.C. App. ___, ___, 802 S.E.2d 508, 513 (2017), *rev'd*, 370 N.C. 681, 811 S.E.2d 138 (2018); *State v. Meadows*, ___ N.C. App. ___, ___, 806 S.E.2d 682, 693-94 (2017), *disc. review allowed*, ___ N.C. ___, 812 S.E.2d 847 (2018); *In re D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 514 (2017).

2. "The judicial policy of *stare decisis* is followed by the courts of this state." *Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) (citation omitted). "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable,

precedential effect is much weaker when a court sits in panels where the judges considering the issue were not necessarily involved in the earlier decision. As the dissent notes in footnote 4, we make mistakes.

One solution to this problem is for this Court to write opinions following our precedent, notwithstanding that panel's view of the weaknesses and errors within the current state of the law. In such an opinion, that panel could explain why the precedent is incorrect and make a direct request for the Supreme Court to use their power of discretionary review to announce the correct rule.

But many judges on this Court view this approach as unrealistic.[3] The Supreme Court hears cases on discretionary review primarily because they involve matters of "significant public interest" or "major significance to the jurisprudence of the State." N.C. Gen. Stat. § 7A-31. Though our frequent intramural disputes over *In re Civil Penalty* seem significant to us, the underlying legal issues often are narrow, are of no public interest, and affect only minor or isolated issues within our jurisprudence. At a high court that hears only seventy or eighty cases on discretionary review each year, these simply won't make the cut.

There is another option. This Court now has the power to sit e*n banc*. *See* N.C. Gen. Stat. § 7A-16. When the Supreme Court issued procedural rules for our *en banc* review, it instructed that we may sit *en banc* "to secure or maintain uniformity of the court's decisions." N.C.

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and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, ___ U.S. ___, ___, 201 L. Ed. 2d 924, 954-55 (2018) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

"[A]ntiquity has never been a reason for this Court to overrule its own prior case law or that of the North Carolina Supreme Court; indeed, this Court does not have authority to do so." *Strickland v. City of Raleigh*, 204 N.C. App. 176, 181, 693 S.E.2d 214, 217 (2010) (citation omitted). "When this Court is presented with identical facts and issues, we are bound to reach the same conclusions as prior panels of this court." *Smith v. City of Fayetteville*, 220 N.C. App. 249, 253, 725 S.E.2d 405, 409 (2012) (citation omitted).

3. Nevertheless, it is "an established rule to abide by former precedents, *stare decisis*, where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land, – not delegated to pronounce a new law, but to maintain and expound the old one – *jus dicere et non jus dare* [to declare the law, not to make the law]." *McGill v. Town of Lumberton*, 218 N.C. 586, 591, 11 S.E.2d 873, 876 (1940) (citation omitted).

R. App. P. 31.1(a)(1). This suggests that our Supreme Court anticipated we would use our authority to sit *en banc* to address these minor conflicts in our case law and resolve them ourselves. And, of course, if this Court sitting *en banc* gets it wrong, an opinion explaining the conflicting cases and the detailed reasons underlying our interpretation of them would issue from this Court, producing an excellent vehicle by which the Supreme Court can grant review and announce the correct rule.

Unfortunately, we have yet to sit *en banc*. To date, there have been 61 petitions filed requesting this Court to hear cases *en banc*, and we have declined to hear every single one. Perhaps some of my fellow judges on this Court are skeptical of whether the Supreme Court wants us to resolve our own conflicts. Some may be convinced that this resolution is not ours, but the business of our higher court. Others may have different motives. Whatever the reasons we have declined to sit *en banc* may be, legitimate or otherwise, encouragement and accountability from the appellate bar would be beneficial. Of course, if the Supreme Court believes this Court should resolve our conflicts *en banc*, it would be helpful for that Court to say so.

INMAN, Judge, concurring in part and dissenting in part.

I concur in the majority opinion affirming the Alimony Order and Attorney Fees Order. I respectfully dissent from the majority opinion vacating the trial court's conclusions of law regarding custody and its decree awarding full custody to Plaintiff. The majority's holding in this respect is precluded by established precedent of the North Carolina Supreme Court and this Court and threatens to upend the stability of decisions by our trial courts in child custody disputes between parents.

The trial court's Amended Order denying Defendant custody and visitation complied with Section 50-13.5 of the North Carolina General Statutes, which provides:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2018) (emphasis added). "Where a statute contains two clauses which prescribe its applicability and clauses are connected by the disjunctive 'or', application of the statute is not

limited to cases falling within both clauses but applies to cases falling within either one of them." *Grassy Creek Neighborhood All., Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (internal quotation marks and citations omitted). Ultimately the trial court found that "[i]t is not in the children's best interests to have visitation with Defendant." Given this finding, pursuant to N.C. Gen. Stat. § 50-13.5(i), the trial court had the authority to suspend Defendant's visitation with the children without finding that Defendant was a person unfit to visit them.

The trial court's express finding that visitation with Defendant was not in the children's best interest followed several other findings by the trial court of Defendant's harmful interactions with her children, including: (1) Defendant's behavior necessitated that her daughter have a safety plan while in her custody; (2) Defendant engaged in physical and verbal altercations with her daughter; (3) Defendant was trespassed from her son's preschool as a result of her behavior there; (4) she had difficulty controlling her son's behavior; (5) she removed her son from preschool contrary to the school's recommendation and without Plaintiff's knowledge or consent; and (6) her daughter's emotional distress was caused by spending time with Defendant. Each of these findings was supported by competent evidence.

The majority does not hold that the trial court erred in its findings of fact regarding Defendant's harmful interactions with the children. The majority does not hold that the trial court erred in finding that visitation with Defendant was not in the children's best interest. Rather, the majority holds that Defendant has a constitutional right to visitation with her children which has been violated by the trial court and remands the matter for "constitutionally required findings based upon clear, cogent, and convincing evidence." In support of today's holding, the majority relies on *Moore v. Moor*e, 160 N.C. App. 569, 587 S.E.2d 74 (2003), a decision disavowed by this Court—and one directly contrary to controlling North Carolina Supreme Court precedent—which held that when resolving a custody dispute between two parents, a trial court cannot suspend one parent's visitation rights absent a finding that either the parent is unfit or engaged in conduct that is inconsistent with his or her protected status. *Id.* at 573, 587 S.E.2d at 76.

Moore held that in a custody dispute between a child's natural or adoptive parents, "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 572, 587 S.E.2d at 76 (internal quotation marks and

citation omitted). As support for this holding, *Moore* quoted *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994), which established a constitutionally-based presumption favoring a parent in a custody dispute with a non-parent (the "*Petersen* presumption").[1] But unlike *Moore*, *Petersen* involved a custody conflict between parents and non-parents. 337 N.C. at 399, 445 S.E.2d at 902. *Moore* did not acknowledge that factual distinction or provide any analysis to support extending the *Petersen* holding to a dispute between two parents. Nor did *Moore* acknowledge controlling Supreme Court precedent expressly holding that *Petersen* does not apply to custody disputes between two parents, such as the case we decide today.

Significantly, after *Petersen* was decided and a few months prior to *Moore*, the North Carolina Supreme Court, in a child custody dispute between a father and maternal grandmother, explained the distinction between proceedings involving (1) a parent versus a non-parent, and (2) a parent versus the other parent:

> We acknowledged the importance of [a parent's] liberty interest nearly a decade ago when this Court [in *Petersen*] held: absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail. The protected liberty interest complements the responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. The justification for the paramount status is eviscerated when a parent's conduct is inconsistent with the presumption or when a parent fails to shoulder the responsibilities that are attendant to rearing a child. Therefore, unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution. *Furthermore, the protected right is*

1. *Petersen* quoted the holding in *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972), that " '[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' " 337 N.C. at 400-01, 445 S.E.2d at 903 (emphasis omitted) (quoting *Stanley*, 405 U.S. at 651, 31 L.Ed.2d at 559). Relying on *Stanley*, the *Petersen* Court noted that a natural parent has a "constitutionally-protected paramount right to custody, care, and control of their child." *Id.* at 400, 445 S.E.2d at 903.

> *irrelevant in a custody proceeding between two natural parents, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must determine custody using the "best interest of the child" test.*

Owenby v. Young, 357 N.C. 142, 145, 579 S.E.2d 264, 266-67 (2003) (internal quotation marks and citations omitted) (emphasis added). *Moore* failed to cite *Owenby*, much less attempt to distinguish its holding that a parent's constitutional right is *irrelevant* in a custody dispute with the other parent. *Moore* was not pursued further on appeal, so its conflict with *Owenby* was not reviewed by the Supreme Court.[2]

The error of *Moore* was ultimately noted a decade later, in a unanimous decision written by a judge who had concurred in *Moore*. In *Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014), that judge, writing for a unanimous panel, concluded that "the standard articulated in *Moore* directly conflicts with prior holdings of . . . our Supreme Court and therefore does not control our decision in the instant case." *Id.* at 624-25, 754 S.E.2d at 700-01. *Respess* explained that prior to *Moore*, precedent consistently held:

> (1) the standard in a custody dispute between a child's parents is the best interest of the child; (2) the applicable burden of proof is the preponderance of the evidence; (3) the principles that govern a custody dispute between a parent and a non-parent are irrelevant to a custody action between parents; and (4) a trial court complies with N.C. Gen. Stat. § 50–13.5(i) if it makes the finding set out in the statute.

Id. at 627, 754 S.E.2d at 702. *Respess* acknowledged our Supreme Court's holding in *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989), that a panel of this Court is bound by a prior decision by another panel of this Court deciding the same issue, but held that rule

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2. Although *Moore* was not appealed, our Supreme Court passed on the opportunity to ratify or adopt the holding of *Moore* two years later in *In re T. K.*, *D.K.*, *T. K.*, *& J. K.*, 171 N.C. App. 35, 613 S.E.2d 739, *aff'd* 360 N.C. 163, 622 S.E.2d 494 (2005). That appeal followed a split decision by this Court. The dissent in *In re T.K.* asserted—as the majority holds here—that a trial court's order awarding visitation to the father was in error because, pursuant to *Moore*, the trial court did not make findings that the mother's "conduct was inconsistent with her protected status as a parent," or, by clear and convincing evidence, that the mother was "unfit as a parent." *Id.* at 44, 613 S.E.2d at 744 (Tyson, J., dissenting). On review, the Supreme Court affirmed the majority opinion *per curiam*. *In re T. K.*, 360 N.C. 163, 622 S.E.2d 494.

of decision did not apply to bind the panel to follow *Moore*, because "this Court has no authority to reverse existing Supreme Court precedent." *Respess*, 232 N.C. App. at 625, 754 S.E.2d at 701. *Respess* was never appealed and, until our Supreme Court tells us otherwise, *Respess* remains good law on both points.

Today's majority opinion quotes a portion of the opinion in *Owenby*, but conspicuously omits the Supreme Court's key holding directly controlling in this case, that a constitutional analysis "is irrelevant in a custody proceeding between two natural parents" and that "[i]n such instances, the trial court must determine custody using the 'best interest of the child' test." *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267; *see also Respess*, 232 N.C. App. at 626, 754 S.E.2d at 701-02 ("*Moore*'s holding that the *Petersen* presumption applies to a trial court's decision to deny visitation rights to a non-custodial parent [in a dispute with the custodial parent] contradicts our Supreme Court's holding [in *Owenby*] that *Petersen* is 'irrelevant' to a dispute between parents and that in such instances, the trial court must determine custody using the 'best interest of the child' test." (internal quotation marks, citation, and brackets omitted)).

The majority also fails to distinguish the facts of this case from *Respess*, or to address the effect of *Owenby* on *Moore*'s precedential value. The majority's holding today deviates from years of consistent precedent and confuses an otherwise settled area of law affecting families across our state.[3]

The majority asserts that *Respess* violated the North Carolina Supreme Court's holding in *In re Appeal of Civil Penalty* that one panel of this Court is bound by a previous panel's decision on the same issue. But the majority fails to acknowledge that *Respess* explicitly held that *In re Civil Penalty* did not require this Court to repeat the holding in *Moore*

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3. As noted by the majority, until it was disavowed by *Respess* as violating controlling precedent, *Moore* was cited in subsequent decisions by this Court for its holding directly contrary to *Owenby*. *But see Everette v. Collins*, 176 N.C. App. 168, 173-74, 625 S.E.2d 796, 799-800 (2006) (distinguishing disputes between parents and non-parents, involving the "constitutionally protected status afforded parents," and disputes between only parents, applying the "best interest of the child" determination without constitutional analysis). But none of the decisions citing *Moore* for that holding acknowledged the conflict. Since *Respess*, *Moore* has been cited by this Court for its holding that a trial court's findings of fact must resolve factual issues rather than merely reciting witness testimony, but it has not been cited in a majority decision for the proposition disavowed in *Respess*. *See State v. Robinson*, __ N.C. App. __, __,805 S.E.2d 309, 317 (2017); *Lueallen v. Lueallen*, __ N.C. App. __, __, 790 S.E.2d 690, 698 (2016); *Kelly v. Kelly*, 228 N.C. App. 600, 610, 747 S.E.2d 268, 278 (2013).

that was contrary to controlling precedent by our Supreme Court. *See Respess*, 232 N.C. App. at 629, 654 S.E.2d at 703.

Earlier this year, in a unanimous opinion, this Court expressly adopted the holding in *Respess* which interpreted and distinguished *In re Civil Penalty* to disavow *Moore*. *See Martinez v. Wake Cty. Bd. of Educ.*, __ N. C. App. __, __, 813 S.E.2d 659, 667 (2018) (discussing *Respess* at length and holding that "it is clear that where a prior ruling of this Court is in conflict with binding Supreme Court precedent, we must follow the decision of the Supreme Court rather than that of our own Court"). Today's decision cannot be harmonized with *Respess* or *Martinez*.

The jurisprudential history of *In re Civil Penalty*, contrasted with the history of *Moore*, *Respess*, and today's decision, demonstrates the majority's error in this case. *In re Civil Penalty* arose from a conflict regarding the precedent established by the North Carolina Supreme Court in *State ex rel. Lanier v. Vines*, 274 N.C. 486, 490, 164 S.E.2d 161, 163 (1968). *Lanier* held that a statute allowing the Commissioner of Insurance to impose a monetary penalty of up to $25,000 for violations of administrative regulations improperly delegated power vested exclusively in the judiciary by Art. IV, § 3, of the North Carolina Constitution. *Id.* at 497, 164 S.E.2d at 168. Almost twenty years later, in *North Carolina Private Protective Services Board v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E.2d 135 (1987), this Court rejected a constitutional challenge to a statute authorizing the North Carolina Private Protective Services Board to impose monetary penalties of up to $2,000 for violations of agency regulations. *Id.* at 147, 360 S.E.2d at 138. *Gray* held that "[t]his case is readily distinguishable from the situation in *Lanier*." *Id.* at 147, 360 S.E.2d at 138.

One year later, in *In re Civil Penalty*, 92 N.C. App. 1, 373 S.E.2d 572 (1989), in a split decision, this Court addressed the constitutionality of a statute authorizing the Department of Natural Resources to assess an administrative penalty against individuals who violated the Sedimentation Pollution Act. *Id.* at 3, 373 S.E.2d at 573. The majority opinion concluded that this Court was bound by the decision in *Lanier*, and not by *Gray*, reasoning that the "rationale [in *Gray*] directly contradicts the rationale and result of *Lanier*." *Id.* at 16, 373 S.E.2d at 581. The dissent asserted that the majority's failure to follow *Gray*'s interpretation of *Lanier* "unjustifiably overrule[d]" *Gray*, which "was correctly decided and should have governed the court's decision in the case before us." *Id.* at 21, 373 S.E.2d at 583 (Becton, J., dissenting). On review, the North Carolina Supreme Court agreed with the dissent and concluded that "the effect of the majority's decision here was to overrule *Gray*.

This it may not do." *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. The Supreme Court went on to explain, in a holding quoted by this Court in dozens of decisions over the past quarter century, that, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *Id.* at 384, 379 S.E.2d at 37.

Unlike this Court's decision in *Gray*, which addressed and distinguished the North Carolina Supreme Court's decision in *Lanier*, this Court's decision in *Moore* utterly failed to acknowledge the Supreme Court's decision in *Owenby*.[4] A citation to *Owenby* is nowhere to be found in *Moore*. The assertion by the majority today that *Moore* applied the holding of *Owenby* misrepresents the reported decision.

Unlike *Moore*, *Respess* cited *Owenby*, discussed it at length, and characterized the Supreme Court's statement that the *Petersen* presumption is "irrelevant in a custody proceeding between two natural parents" as a "holding" in *Owenby*. *Respess*, 232 N.C. App. at 625-26, 754 S.E.2d at 701-02. As *Respess* has not been overturned by a higher court, we are thus bound by its interpretation of *Owenby*, and must conclude that the language ignored by the majority in today's decision is a holding by our Supreme Court. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. And it is directly controlling here. This Court's holding in *Moore* must yield to the Supreme Court's holding in *Owenby*. We do not have the "authority to overrule decisions of the Supreme Court of North Carolina and [have a] responsibility to follow those decisions, until otherwise ordered by the Supreme Court." *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985).

The rule of decision established by *In re Civil Penalty* applies when two panels of this Court issue conflicting decisions on the same issue without distinguishing the facts or applicable law, passing each other like ships in the night. But *In re Civil Penalty* does not bind a panel of this Court to a decision by a prior panel that conflicts with Supreme

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4. I do not suggest that the panel in *Moore* deliberately ignored *Owenby*. The Supreme Court issued its decision in *Owenby* in May 2003; *Moore* was heard in this Court just three months later, in August 2003. Given the typical lapse of months between the submission of briefs and hearing before this Court in most cases, it is likely that *Owenby* was decided by the Supreme Court after briefing in *Moore* was completed, and that neither counsel nor the panel deciding *Moore* realized that binding precedent intervened. Such an error reflects not defiance or judicial recklessness but merely the very human occurrence of overlooking a new precedent when deciding one among a tremendous volume of cases heard by panels of this Court. By contrast, today's majority violates precedent specifically called to its attention.

Court precedent. The conflict between a decision by this Court and one by our Supreme Court is more akin to a row boat passing an ocean liner. It is resolved not by *In re Civil Penalty* but by *stare decisis*.

"A primary goal of adjudicatory proceedings is the uniform application of law. In furtherance of this objective, courts generally consider themselves bound by prior precedent, *i.e.*, the doctrine of *stare decisis*." *Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851-52 (2001). The doctrine of *stare decisis* "is a maxim to be held forever sacred." *Commonwealth v. Coxe*, 4 U.S. 170, 1 L. Ed. 786, 4 Dall. 170, 192 (Pa. 1800). Because it is so fundamental to our jurisprudence, the doctrine is generally applied without comment and is described at length only in dissenting opinions. "Adhering to this fixed standard ensures that we remain true to the rule of law, the consistent interpretation and application of the law." *State ex. rel. McCrory v. Berger*, 368 N.C. 633, 651, 781 S.E.2d 248, 260 (2016) (Newby, J., concurring in part and dissenting in part). "[T]here must be some uniformity in judicial decisions . . . or else the law itself, the very chart by which we are sailing, will become as unstable and uncertain as the shifting sands of the sea[.]" *State v. Bell*, 184 N.C. 701, 720, 115 S.E. 190, 199 (1922) (Stacy, J., dissenting).

This Court in *Respess* correctly held that it was not bound by *In re Civil Penalty* to follow *Moore*'s holding—which plainly diverged from Supreme Court precedent. And, as *Respess* distinguished *In re Civil Penalty* and explained why it did not apply—*i.e.*, that it did not bind the panel to *Moore*—we are bound by that interpretation, ironically pursuant to *In re Civil Penalty*. Stated differently, the majority charts the same wayward course that previously led this Court to run aground even though our Supreme Court has built us a lighthouse in *In re Civil Penalty*; just as *Gray* constituted a binding interpretation of *Lanier*, *Respess* provided binding interpretations of *Owenby*[5] and *In re Civil Penalty*. We are bound by *Respess* unless and until it is disavowed by our Supreme Court.

The majority opinion today vacates the conclusions of law and custody portions of the Amended Order based on the trial court's failure to include findings only deemed necessary in *Moore*. Today's decision, like the decision in *Moore*, conflicts with binding precedent and the plain language of N.C. Gen. Stat. § 50-13.5(i), the governing statute. Because the dispute is exclusively between the children's parents, the trial

5. As recounted *supra*, there is nothing in *Moore* to indicate it was interpreting or applying *Owenby*, let alone that it was cognizant of the decision. Thus, *Respess* was not bound by any interpretation of *Owenby* in *Moore*, as none appears therein.

court properly applied the "best interest of the child" test. *See Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001) ("In a custody proceeding between two natural parents (including biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the 'best interest of the child' test.").

The majority today also asserts—again citing *Moore*—that the "Amended Order purported to deny Defendant all custody and visitation with her children, effectively terminating her parental rights." A loss of visitation or custody in a Chapter 50 proceeding between two parents is fundamentally different from the termination of parental rights, which can only be accomplished in a proceeding pursuant to Chapter 7B. "Our jurisprudence has long recognized significant differences between a child custody order, which is subject to modification upon a showing of changed circumstances, and orders for adoption or for termination of parental rights, which are permanent." *Respess*, 232 N.C. App. at 626, 754 S.E.2d at 702 (citations omitted). Among other things, the standard of proof prescribed by Chapter 50 for custody disputes between parents is a preponderance of the evidence; by contrast, the standard of proof prescribed by Chapter 7B for termination of parental rights is clear and convincing evidence. N.C. Gen. Stat. § 7B-1110(b) (2018); *Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001).

For the foregoing reasons, I respectfully dissent from the majority opinion regarding the award of child custody and would affirm the Amended Order's conclusions of law and decree regarding custody.

Because I dissent from the majority opinion vacating the trial court's decree suspending Defendant's right to visitation with her children, I disagree with the majority's holding that the trial court erred by delegating to Plaintiff the sole discretion to allow, or deny, telephone contact between Defendant and their children. That is, if Defendant has no right to visitation, the trial court's delegation of discretion to Plaintiff is mere surplusage, albeit admittedly confusing. Assuming *arguendo* that the trial court erred in this portion of its decree, it was surplusage that does not require appellate review.

In sum, I concur in the majority opinion affirming the Alimony Order and Attorney Fees Order. I respectfully dissent from the majority opinion vacating the trial court's conclusions of law and its decree awarding full custody to Plaintiff.

STATE OF NORTH CAROLINA
v.
GREGORY GARRISON COLE

No. COA18-286

Filed 20 November 2018

1. Motor Vehicles—driving while impaired—superior court—jurisdiction—dismissal of district court charge—functional equivalent

The superior court correctly denied defendant's motion to dismiss an indictment for lack of jurisdiction where defendant was initially charged with misdemeanor driving while impaired, the State began a superior court proceeding by presentment and indictment, and the district court action was never formally dismissed. Although the district court has exclusive jurisdiction for the trial of misdemeanors, the superior court may obtain jurisdiction by initiating a presentment. To the extent that concurrent jurisdiction exists, the first court to exercise jurisdiction obtains jurisdiction to the exclusion of the other. Here, there was no evidence that the district court exercised its jurisdiction after concurrent jurisdiction existed, and the State made clear its intent to abandon the district court action. This served as the functional equivalent of a dismissal.

2. Search and Seizure—fruit of the poisonous tree—traffic stop—roadside breath test—subsequent intoxilyzer test

There was no plain error in a prosecution for driving while impaired (DWI) where the trial court admitted evidence discovered after an allegedly unlawfully compelled roadside breath test. The trial court did not address whether subsequent evidence was obtained as a result of the roadside test, but held the initial stop was justified by defendant's license plate not being illuminated. The superior court's findings were sufficient to justify the initial traffic stop and supported a conclusion that the officer had probable cause to arrest defendant for DWI, which justified the later intoxilyzer test.

3. Motor Vehicles—driving while impaired—officer's subjective opinion

In a driving while impaired prosecution, an officer's testimony that he would have given defendant a ride home if he tested low enough did not establish that the officer lacked sufficient information to believe that defendant was appreciably impaired. The

officer's subjective opinion is not material; the search is valid when the objective facts known to the officer meet the required standard.

4. Motor Vehicles—driving while impaired—multiple tests—implied consent rights

A driving while impaired defendant's right to be re-advised of his implied consent rights was not violated where a first test on an intoxilyzer machine failed to produce a valid result and the test was administered again on a second machine without an additional advisement to defendant of his rights. The request that defendant provide another sample for the same chemical analysis of his breath was not a "subsequent chemical analysis" that would trigger a re-advisement pursuant to N.C.G.S. § 20-139.1(b5) because defendant was not asked to submit to a different chemical analysis for his blood or other bodily fluid or substance in addition to the breath analysis.

5. Motor Vehicles—driving while impaired—sentencing—prior conviction

The trial court did not err by concluding that defendant's prior driving while impaired conviction constituted a "prior conviction," even though the conviction was on appeal, and finding a grossly aggravating factor based on that conviction. There is no statutory language limiting the definition of prior conviction to a "final" conviction or only to those not challenged on appeal. The plain and unambiguous language of N.C.G.S. § 20-179(c)(1)(a) defines a prior conviction merely as a conviction that occurred within seven years of the subsequent offense.

Appeal by defendant from judgment entered 31 August 2017 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 1 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Rick Brown, for the State.

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for defendant.

ELMORE, Judge.

Defendant Gregory Cole appeals a judgment entered after a jury convicted him of driving while impaired ("DWI"). He argues the superior court erred by (1) denying his motion to dismiss the indictment

for lack of jurisdiction because the same charge against him remained pending and valid in district court; (2) denying his motion to suppress the results of roadside sobriety tests and a later intoxilyzer test because those tests were administered during an unlawful detention that arose as a direct consequence of an illegal roadside breath test and thus constituted tainted fruit of that poisonous tree; (3) denying his motion to suppress the intoxilyzer results on the additional ground that the superior court improperly concluded the administrating officer's request he submit a breath sample on a second intoxilyzer machine after the first one failed to produce a valid result did not constitute a request for a "subsequent chemical analysis" under N.C. Gen. Stat. § 20-139.1(b5) and thus did not trigger that statute's requirement that the officer re-advise him of his implied-consent rights before administering the test on the second machine; and (4) enhancing his sentence because the superior court's finding of the existence of an aggravating factor was based on his prior DWI conviction that was pending on appeal and thus was not "final" so it failed to qualify as a "prior conviction" for enhanced sentencing purposes under N.C. Gen. Stat. § 20-179(c)(1).

We hold the superior court properly (1) denied the motion to dismiss the indictment for lack of jurisdiction because the district court charge was no longer pending or valid; (2) denied the motion to suppress the evidence discovered after the roadside breath test because, before that test, objective reasonable suspicion existed that defendant may be driving while impaired, thereby justifying the officer to prolong the initial traffic stop to investigate defendant's potential impairment; (3) denied the motion to suppress the intoxilyzer results because the officer's request that defendant submit another breath sample to administer the same chemical analysis of the breath on a second intoxilyzer machine did not trigger N.C. Gen. Stat. § 20-139.1(b5)'s re-advisement requirement; and (4) enhanced defendant's sentence because his prior DWI conviction, despite its status being pending on appeal, supporting a finding of the existence of the grossly aggravating factor of a "prior conviction" under N.C. Gen. Stat. § 20-179(c). Accordingly, we hold defendant received a fair trial and sentence, free of error.

I. Background

The State's evidence tended to show the following facts. Around 12:30 a.m. on 8 March 2015, Officer Jonathan Ray of the Weaverville Police Department was conducting a business security check at Twisted Laurel, a bar and grill in Weaverville, when he observed defendant exit through the back door of the business and walk toward the parking lot. After completing the business check a few minutes later, Officer

Ray started working traffic control and observed a burgundy van leave Twisted Laurel's parking lot with no rear lamps illuminating its license plate in violation of N.C. Gen. Stat. § 20-129(d). Officer Ray followed the van for about two miles, observing it "weaving slightly within its lane" and "travel[ ] over onto the white fog line on the right-hand side of the road" a few times, before activating his blue lights and stopping the van.

When Officer Ray approached, he discovered defendant, whom he recognized as the person he had just seen leaving Twisted Laurel, was driving the van. When Officer Ray requested his driver's license, defendant initially presented his debit card. Officer Ray returned the debit card and defendant correctly furnished his license. Officer Ray "smell[ed] an odor of alcohol on [defendant]" and "noticed that he had red glassy eyes as well." When Officer Ray asked if he had been drinking, defendant replied that he had not, but had been "working at the bar" and "may have spilled some alcohol on himself." Defendant "denied drinking about three times before he finally admitted . . . that he had been drinking."

Officer Ray asked defendant to submit to a roadside breath test using an Alco Sensor SFST. Defendant replied "[t]he preliminary breath test on the roadside was illegal to use in the State of North Carolina." After Officer Ray informed defendant that if he did not submit to the test, he would be taken into custody and transported to the station for a breath sample, defendant agreed to submit to the roadside breath test, which produced a positive result. Officer Ray then directed defendant out of his vehicle and administered roadside sobriety tests. According to Officer Ray, defendant exhibited "six out of the six clues" on the horizontal gaze nystagmus ("HGN") test; "[f]ive out of eight" clues on the walk-and-turn test; "two" out of "four" clues on the one-leg stand test; and exhibited clues of impairment, including swaying back and forth and inaccurately counting seconds, on the Romberg balance test. After a second breath test also produced a positive result, Officer Ray arrested defendant for DWI and transported him to the Buncombe County Detention Facility.

About ten minutes after arriving at the jail, Officer Ray brought defendant to a room containing three Intox ECIR-II machines, read him his implied-consent rights and furnished him a written copy of those rights pursuant to N.C. Gen. Stat. § 20-16.2. Defendant acknowledged his rights and agreed to submit to a chemical analysis of his breath. After waiting the required 15-minute observation period, Officer Ray attempted to administer the test on one of the three intoxilyzer machines. But after defendant's breath sample produced a "mouth alcohol" reading, Officer Ray transferred defendant to one of the

adjacent machines for another test. After waiting another 15-minute observation period and without re-advising defendant of his implied-consent rights, Officer Ray administered the breath test on that second machine, which produced a valid result.

That same night, on 8 March 2015, Officer Ray cited defendant for misdemeanor DWI and for unlawful failure to burn rear vehicle lamps. *See* N.C. Gen. Stat. §§ 20-138.1, -129(d) (2017). On 6 June 2016, a grand jury issued a presentment requesting the district attorney investigate both offenses. On 11 July 2016, a grand jury indicted defendant of both charges.

Before trial in superior court, defendant moved to quash or dismiss the indictment for lack of jurisdiction. He argued that because the State never dismissed the citation in district court, that charge remained valid and pending, and thus the superior court lacked authority to exercise its jurisdiction over the same offense and must dismiss the indictment. *See* N.C. Gen. Stat. § 15A-954(a)(6) (2017) (requiring a court to "dismiss the charges stated in a criminal pleading if it determines that[ ] . . . [t]he defendant has previously been charged with the same offense in another North Carolina court of competent jurisdiction, and the criminal pleading charging the offense is still pending and valid"). The State argued it need not have dismissed the citation in the district court because the indictment superseded that charge and, further, that its records indicate there was no longer any charge against defendant pending in district court. The superior court denied the motion.

Defendant also filed three pretrial motions to suppress evidence. First, he moved to suppress all evidence on the grounds that Officer Ray lacked reasonable suspicion for the traffic stop. The superior court concluded in relevant part that reasonable suspicion existed based on Officer Ray observing the van without rear lamps illuminating the license plate in violation of N.C. Gen. Stat. § 20-129 and denied the motion. Defendant does not challenge this ruling.

Second, defendant moved to suppress all evidence based on the illegality of the roadside breath test. He argued Officer Ray (1) unlawfully compelled defendant to submit to the roadside breath test and thus the subsequent field sobriety tests results and later intoxilyzer test results constituted tainted fruit of the poisonous tree of that illegal roadside breath test search; (2) unlawfully prolonged the traffic stop because his "demand [for] a preliminary breath test constitute[d] a seizure beyond the scop[e] of the initial stop and without reasonable suspicion of criminal activity"; and (3) improperly relied upon the numerical results of

the roadside breath test in forming probable cause to arrest defendant for DWI and, therefore, that "the State [was] unable to meet its burden to demonstrate [Officer Ray] possessed objectively reasonable probable cause to arrest the defendant." The superior court concluded the roadside breath tests were unlawfully compelled and thus suppressed the positive-results evidence from those tests. However, it further concluded, even without that illegally obtained evidence, Officer Ray had probable cause to arrest defendant for DWI and thus declined to suppress any other evidence.

Third, defendant moved to suppress the intoxilyzer results on the grounds that Officer Ray failed to re-advise him of his implied-consent rights in violation of N.C. Gen. Stat. § 20-139.1(b5). Defendant acknowledged that Officer Ray duly advised him of his implied-consent rights under N.C. Gen. Stat. § 20-16.2 and that he agreed to submit to a chemical analysis of his breath prior to Officer Ray administering that test on the first intoxilyzer machine. He argued that because the first machine failed to produce a valid result, the administration of that test was a "nullity." Thus, defendant asserted, Officer Ray's subsequent request that he provide another sample to administer the test on a second machine was a request for a "subsequent chemical analysis" under N.C. Gen. Stat. § 20-139.1(b5), triggering his right under that statute to be re-advised of his implied-consent rights. Therefore, defendant continued, the results of the intoxilyzer test should be suppressed because Officer Ray failed to re-advise him of his implied-consent rights before administering the breath test on the second machine. The superior court concluded Officer Ray's request did not trigger N.C. Gen. Stat. § 20-139.1(b5)'s re-advisement requirement because it was merely a request to submit to the same chemical analysis and therefore refused to suppress the intoxilyzer results on that basis.

At trial, defendant failed to object to the introduction of the field-sobriety-tests-results evidence or the intoxilyzer-results evidence, the superior court dismissed the failure to burn rear lamps infraction due to insufficiency of the indictment, and the jury found defendant guilty of DWI.

At sentencing, defendant objected to the use of a prior DWI conviction obtained against him in superior court on 15 September 2016 to support a finding of the existence of a grossly aggravating factor for the purpose of enhancing his sentence. He argued that because the prior conviction was currently pending on appeal, it was not "final" and thus did not qualify as a "prior conviction" under N.C. Gen. Stat. § 20-179(c). The superior court concluded the prior DWI conviction, despite it being

pending on appeal, supported a finding of the existence of a grossly aggravating factor but noted its willingness to resentence defendant if that conviction was later reversed. Accordingly, the superior court entered a judgment finding the grossly aggravating factor of a prior DWI conviction and sentencing defendant as a Level Two offender to twelve months' incarceration, suspended for eighteen months of supervised probation with special conditions that he surrender his driver's license to the Division of Motor Vehicles and serve an active term of thirty days. Defendant appeals.

II. Issues Presented

On appeal, defendant presents four issues. First, he argues the superior court erred by denying his motion to dismiss the indictment for lack of jurisdiction because the same charge against him was still valid and pending in district court. Second, that the superior court erred by denying his motion to suppress all evidence arising from the traffic stop because it was obtained during an unlawful detention that occurred as a direct consequence of an illegal roadside breath test and thus was tainted fruit of that poisonous tree. Third, that the superior court erred by denying his motion to suppress the intoxilyzer results because it improperly concluded Officer Ray's request he provide another breath sample on a different intoxilyzer machine was not a request for a "subsequent chemical analysis" under N.C. Gen. Stat. § 20-139.1(b5). And fourth, that the superior court erred by enhancing his sentence on the grounds that his prior DWI conviction, since it was currently pending on appeal, did not qualify as a "prior conviction" under N.C. Gen. Stat. § 20-179(c) and thus could not be used to support a finding of the existence of a grossly aggravating factor.

III. Motion to Dismiss Indictment for Lack of Jurisdiction

[1] Defendant first asserts the superior court erred by denying his motion to dismiss the DWI indictment for lack of jurisdiction. He argues that because the State failed to dismiss the citation charging the same offense in district court, that charge remained valid and pending in district court, and thus the superior court was required to dismiss the indictment under N.C. Gen. Stat. § 15A-954(a)(6). We disagree.

A. Review Standard

We review subject-matter jurisdiction challenges *de novo*. *State v. Rogers*, ___ N.C. App. ___, ___, 808 S.E.2d 156, 162 (2017) (citing *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007)). We

also review issues of statutory interpretation *de novo*. *State v. Davis*, 368 N.C. 794, 797, 785 S.E.2d 312, 315 (2016).

B. Discussion

N.C. Gen. Stat. § 7A-272(a) provides that "[e]xcept as provided in . . . Article [22], the district court has exclusive, original jurisdiction for the trial of . . . misdemeanors." N.C. Gen. Stat. § 7A-272(a) (2017); *see also State v. Felmet*, 302 N.C. 173, 174, 273 S.E.2d 708, 710 (1981) ("Exclusive original jurisdiction of all misdemeanors is in the district courts of North Carolina." (citing N.C. Gen. Stat. § 7A-272)). Section 7A-271 of Article 22 provides in relevant part that "the superior court has jurisdiction to try a misdemeanor[ ] . . . [w]hen the charge is initiated by presentment[.]" N.C. Gen. Stat. § 7A-271(a)(2) (2017). " '[I]nitiated' refers to how the criminal process in superior court began, not to what the first criminal process of any kind in any court was." *State v. Gunter*, 111 N.C. App. 621, 625, 433 S.E.2d 191, 193 (1993) (interpreting these statutes and rejecting the defendant's argument that the superior court lacked jurisdiction over a charge initiated by presentment because the district court first acquired jurisdiction over the same charge by citation).

Here, the 8 March 2015 misdemeanor DWI citation granted the district court authority to exercise its original jurisdiction over the charge. *See* N.C. Gen. Stat. § 7A-272(a). However, after the 6 June 2016 presentment and later indictment, the superior court had authority to exercise its jurisdiction over the charge. *See* N.C. Gen. Stat. § 7A-271(a)(2); *see also Gunter*, 111 N.C. App. at 625, 433 S.E.2d at 193–94 (holding that although a citation invoked the district court's jurisdiction, a later presentment and indictment charging the same offense vested the superior court with jurisdiction). Because the charge in superior court was initiated by presentment, the superior court acquired jurisdiction over the offense when the indictment issued, and it thus properly denied the motion to dismiss the indictment for lack of jurisdiction.

Nonetheless, defendant argues that because the State never dismissed the citation in district court, that charge remained pending and active, and thus the superior court was required to dismiss the indictment. *See* N.C. Gen. Stat. § 15A-954(a)(6) (requiring a superior court to "dismiss the charges stated in a criminal pleading if it determines that[ ] . . . the defendant has previously been charged with the same offense in another North Carolina court of competent jurisdiction, and the criminal pleading charging the offense is still *pending and valid*." (emphasis added)). We disagree.

Here, in response to defendant's motion to dismiss the indictment in superior court, the State replied as follows:

> [STATE]: . . . [T]he matter that was left in District Court is simply superceded by this indictment. A simple search of our coding and our records indicates that the only pending matters in Buncombe County against [defendant] are the Superior Court matters. The District Court case -- the matter that originated in District Court is simply no longer pending. This particular indictment super[s]eded that. . . .
>
> As a result of the fact that there's still no pending matter in District Court . . . this sort of eliminates any idea of a competing claim, that the State is attempting to find him guilty or prosecute him in two separate courtrooms. The matter in District Court just simply isn't there any more. It's here now based on that indictment.

As reflected, although the State never filed a formal dismissal of the citation in district court, it made clear that it had abandoned its prosecution in district court to the exclusion of its superior court prosecution, which effectively served as the functional equivalent of a dismissal of the district court charge, rendering it no longer valid and pending. *See State v. Cole*, No. 17-732, slip op. at 5–9 (N.C. App. Aug. 21, 2018) (unpublished) (rejecting this same argument, reasoning in relevant part that it was "evident from the transcript that defendant was only prosecuted through the Superior Court action and that the District Court action was effectively dismissed—even if no formal dismissal occurred"). Further, as a result of the State's announced election to only prosecute the charge in superior court, once jeopardy attached to the indictment, the State would be barred under double jeopardy principles from later prosecuting that charge in district court. *Cf. State v. Courtney*, ___ N.C. App. ___, ____, 817 S.E.2d 412, 420 (explaining the binding effect of the "State's election" rule in the context of a district attorney's announced election to dismiss and not to exercise the State's right to retry a hung charge after jeopardy had already attached to the indictment), *disc. rev. allowed*, ___ N.C. ___, 818 S.E.2d 109 (2018). Accordingly, we overrule this argument.

Defendant also relies on *State v. Karbas*, 28 N.C. App. 372, 221 S.E.2d 98 (1976), to support his argument that the State's failure to dismiss the citation in district court precluded the superior court from exercising its jurisdiction over the same offense. In *Karbas*, we stated that "[w]here two courts have concurrent jurisdiction of certain offenses, the court

first exercising jurisdiction in a particular prosecution obtains jurisdiction to the exclusion of the other. But when it enters a *nolle prosequi* it loses jurisdiction and the other court may proceed." *Id.* at 374, 221 S.E.2d at 100 (citation omitted). Defendant's reliance on *Karbas* is misguided.

To the extent that the district and superior courts here shared concurrent jurisdiction over the misdemeanor DWI charge, that concurrent jurisdiction did not exist until the superior court indictment issued on 11 July 2016. Defendant points to no evidence suggesting that, after that time, the district court exercised jurisdiction over the offense. Indeed, in his 8 September 2016 motion to dismiss the indictment for lack of jurisdiction, defendant stated "[t]he citation issued in this mat[t]er remains active, *although the case is not currently calendared in district court.*" (Emphasis added.) As there is no record evidence suggesting the district court exercised its jurisdiction over the offense after the existence of concurrent jurisdiction with the superior court, *Karbas*'s language that the first court exercising jurisdiction over a shared offense is exclusive of the other court absent a dismissal terminating the first court's jurisdiction provides no support here. Accordingly, we overrule this argument.

In sum, because the charge was initiated by presentment, the superior court acquired jurisdiction over the offense after the indictment issued. Despite the State's failure to dismiss the citation in district court, it made clear it had abandoned its prosecution in district court, which served as the functional equivalent of a dismissal, rendering it no longer valid and pending, and once jeopardy attached to the indictment, the State would be precluded from later prosecuting the charge in district court under double jeopardy principles. Further, no evidence suggests the district court exercised its jurisdiction over the offense once concurrent jurisdiction with the superior court existed. Therefore, we affirm the superior court's denial of defendant's motion to dismiss the indictment for lack of jurisdiction.

IV. Motions to Suppress Evidence

[2] Defendant next argues the superior court erred by denying his motions to suppress the evidence discovered as a result of the traffic stop. First, he argues the results of the roadside sobriety tests and later intoxilyzer test should have been suppressed as tainted fruit of the poisonous tree of the illegal search and seizure arising from the unlawfully compelled roadside breath test. Second, he argues the intoxilyzer results should have been suppressed on the additional basis that the test was administered in violation of his implied-consent rights under N.C. Gen. Stat. §§ 20-16.2 and 20-139.1(b5). We disagree.

A. Preservation

Defendant acknowledges that, although he filed pretrial motions to suppress this evidence on these grounds, he failed to object to the admission of that evidence at trial. Therefore, he argues that the superior court's admission of this evidence constituted plain error. N.C. R. App. P. 10(a)(4). Accordingly, we review these issues only for plain error. *See*, *e.g.*, *State v. Waring*, 364 N.C. 443, 468, 701 S.E.2d 615, 632 (2010) ("[T]o the extent defendant failed to preserve issues relating to the motion to suppress, we review for plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted). "The first step under plain error review is[ ] . . . to determine whether any error occurred at all." *State v. Lenoir*, ___ N.C. App. ___, ___, 816 S.E.2d 880, 883 (2018) (quoting *State v. Oxendine*, 246 N.C. App. 502, 510, 783 S.E.2d 286, 292, *disc. rev. denied*, ___ N.C. ___, 787 S.E.2d 24 (2016)).

B. Review Standard

Our review of a suppression ruling is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Legal conclusions "are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

C. Tainted Fruit

Defendant asserts the results of the roadside sobriety tests and intoxilyzer test should have been suppressed as tainted fruit of the poisonous tree of the illegal search and seizure caused by the unlawfully compelled roadside breath test. We disagree.

Initially, we note that although defendant in his written suppression motion and at the suppression hearing argued that, *inter alia*, all evidence discovered after the illegal roadside breath test should have been

suppressed as tainted fruit of that poisonous tree, the superior court here did not directly address whether that evidence may have been acquired as a direct consequence of the illegal breath test, or whether Officer Ray was justified in prolonging the initial traffic stop to investigate defendant's potential impairment. Rather, the superior court concluded that reasonable suspicion existed to justify the initial traffic stop based primarily on defendant's license plate not being illuminated in violation of N.C. Gen. Stat. § 20-129 and that, notwithstanding the results of the illegal roadside breath test, the facts known to Officer Ray, including the later acquired results of the roadside sobriety tests, established probable cause to arrest defendant for DWI. Nonetheless, "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given . . . is sound or tenable. The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (quoting *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987)).

"The 'fruit of the poisonous tree doctrine,' a specific application of the exclusionary rule, provides that '[w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the "fruit" of that unlawful conduct should be suppressed.' " *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) (quoting *State v. Pope*, 333 N.C. 106, 113–14, 423 S.E.2d 740, 744 (1992)). But "[o]nly evidence discovered *as a result of unconstitutional conduct* constitutes 'fruit of the poisonous tree.' " *McKinney*, 361 N.C. at 58, 637 S.E.2d at 872 (emphasis added) (citing *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)). "Once the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion . . . ." *State v. Jackson*, 199 N.C. App. 236, 241–42, 681 S.E.2d 492, 496 (2009) (citation omitted). It follows that if facts independent of those acquired from unlawful police conduct established legal justification for a seizure, evidence discovered during that lawful detention would not be tainted as a direct consequence of unconstitutional conduct. *Cf. McKinney*, 361 N.C. at 59, 637 S.E.2d at 873 (applying this principle in the context of assessing tainted evidence in a search warrant affidavit); *see also id.* at 62, 637 S.E.2d at 874 ("[T]he admissibility of the evidence defendant sought to suppress turns on whether the *untainted* evidence in the supporting affidavit established probable cause to search his residence.").

"To determine whether reasonable suspicion exists, courts must look at 'the totality of the circumstances' as 'viewed from the standpoint of an objectively reasonable police officer.' " *State v. Johnson*, 370 N.C. 32, 34–35, 803 S.E.2d 137, 139 (2017) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621(1981), and then *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)). As defendant has not challenged the evidentiary sufficiency of the superior court's findings, they are binding on appeal. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (citations omitted).

Here, the superior court rendered the following unchallenged findings to support its conclusion that Officer Ray had reasonable suspicion to justify the initial traffic stop: "[(1)] Defendant was coming out of a bar [(2)] after midnight and [(3)] . . . weave[d] within his lane. He did not cross over the fog line but did several times . . . swerve onto the fog line[.]" Additionally, the superior court rendered the following unchallenged findings to support its conclusion that, notwithstanding the roadside breath test results, Officer Ray had probable cause to arrest defendant for DWI:

> [(4)] the driving of the Defendant, [(5)] the strong odor of alcohol, [(6)] the fact that the Defendant presented his debit card rather than his [driver's license], . . . [(7)] [defendant] did admit to drinking alcohol, and [defendant's] performance on [(8)] the walk and turn test, [(9)] the HGN test, and [(10)] the Romberg balance test.

We conclude the superior court's findings that Officer Ray observed defendant (1) exit a bar (2) after midnight (3) and swerve several times within his driving lane, combined with its findings that after the initial traffic stop, the legality of which defendant does not challenge on appeal, (4) Officer Ray smelled a "strong odor of alcohol," (5) defendant present his debit card when asked for his driver's license, and (6) defendant initially denied but later admitted to drinking alcohol, were sufficient to establish reasonable suspicion to justify prolonging the initial traffic stop to investigate defendant's potential impairment, including administering the roadside sobriety tests. Those findings in conjunction with the findings on defendant's performance on the roadside sobriety tests in turn supported a conclusion that Officer Ray had probable cause to arrest defendant for DWI, which justified the later intoxilyzer test. Therefore, the superior court properly refused to suppress the results of the roadside sobriety tests and the intoxilyzer test. Accordingly, we hold the superior court did not commit plain error by admitting this evidence at trial.

[3] Defendant also argues that Officer Ray's testimony that "[i]f [defendant] tested low enough, [he] would [have] give[n defendant] a ride home" and "for the sake of the .08 standard, [he] was going to give [defendant] a ride home if he fell below that[,]" establishes that Officer Ray "lacked sufficient information to believe that . . . defendant was appreciably impaired at the point where the alco-sensor test was administered." This argument fails because Officer Ray's

> subjective opinion is not material. Nor are the courts bound by an officer's mistaken legal conclusion as to the existence or non-existence of probable cause or reasonable grounds for his actions. The search or seizure is valid when the objective facts known to the officer meet the standard required.

Bone, 354 N.C. at 10, 550 S.E.2d at 488 (emphasis omitted) (quoting *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641–42 (1982); other citation omitted); *see also id.* (holding an officer's suppression hearing testimony that he did not believe he had probable cause to arrest was irrelevant in determining whether, objectively, the facts known to that officer created probable cause to justify a search-incident-to-arrest seizure of evidence). Having concluded above that the objective facts known to Officer Ray before the administration of the roadside breath test established reasonable suspicion to justify prolonging the initial traffic stop to investigate defendant's potential impairment, we overrule this argument.

D. Statutory Implied-Consent Rights

[4] Defendant next asserts the superior court erred by denying his motion to suppress the intoxilyzer results because it improperly concluded that Officer Ray was not required under N.C. Gen. Stat. § 20-139.1(b5) to re-advise him of his implied-consent rights before administering the breath test on a second machine. Defendant does not dispute that Officer Ray duly advised him of his implied-consent rights before he agreed to submit to a chemical analysis of his breath; rather, he argues that because the test administered on the first intoxilyzer machine failed to produce a valid result, it was a "nullity," and thus Officer Ray's subsequent request that defendant provide another sample to administer the test on a different intoxilyzer machine constituted a request for a "subsequent chemical analysis" under N.C. Gen. Stat. § 20-139.1(b5). Therefore, defendant argues, Officer Ray violated his right under that statute to be re-advised of his implied-consent rights before administering the test on the second machine. We disagree.

We review the superior court's legal conclusions *de novo*. *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631. We also review issues of statutory interpretation *de novo*. *Davis*, 368 N.C. at 797, 785 S.E.2d at 315.

An officer must advise a person charged with DWI of his or her implied-consent rights before requesting that person to submit to a chemical analysis of the breath. N.C. Gen. Stat. § 20-16.2(a) (2017). An officer may then request that person "submit to a chemical analysis of [his or her] blood or other bodily fluid or substance *in addition to or in lieu of a chemical analysis of the breath*" and, "[i]f a subsequent chemical analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a)." N.C. Gen. Stat. § 20-139.1(b5) (2017) (emphasis added).

The plain and unambiguous language of N.C. Gen. Stat. § 20-139.1(b5) provides that the re-advisement right triggers only when an officer requests a person to submit to a chemical analysis of "the person's blood or other bodily fluid or substance *in addition to or in lieu of a chemical analysis of the breath*[.]" *Id.* (emphasis added). Officer Ray's request that defendant provide another sample for the same chemical analysis of the breath on a second intoxilyzer machine was not one for a "subsequent chemical analysis" under the statute. Accordingly, N.C. Gen. Stat. § 20-139.1(b5)'s re-advisement requirement never triggered, and the superior court properly refused to suppress the intoxilyzer results on this basis.

Nonetheless, defendant relies on *State v. Williams*, 234 N.C. App 445, 450, 759 S.E.2d 350, 353 (2014), to support his position. He argues that "*Williams* stands for the unqualified proposition that when a subsequent test is requested, the defendant must be re-advised of the implied consent rights." We disagree. In *Williams*, we held that when a person refuses to submit to a breath test, an officer must re-advise that person of his implied-consent rights before requesting he or she submit to a blood test instead of a breath test pursuant to N.C. Gen. Stat. § 20-139.1(b5). *Id.* at 452, 759 S.E.2d at 354. Defendant's reliance on *Williams* is misguided because the officer there requested the defendant to submit to a *different* chemical analysis—a blood test—*in lieu of* the breath test. Here, Officer Ray only requested that defendant submit to one chemical analysis—the breath test—which was not in addition to or in lieu of the original breath test. Accordingly, we overrule this argument.

V. "Prior Conviction" for Enhanced Sentence

[5] Last, defendant asserts the superior court erred by sentencing him as a Level Two offender after finding the existence of a grossly aggravating

factor based on upon his prior DWI conviction. Defendant was convicted in superior court of DWI on 15 September 2016. He appealed that conviction on 26 September 2016, which remained pending before this Court at the time of the instant 31 August 2017 sentencing hearing. Before the superior court and now on appeal, defendant argues his prior DWI conviction could not be used to enhance his sentence because the prior conviction, since it was pending on appeal, was not "final" and therefore could not be used as a "prior conviction" to find the existence of a grossly aggravating factor under N.C. Gen. Stat. § 20-179(c). We disagree.

We review issues of statutory interpretation *de novo*. *Davis*, 368 N.C. at 797, 785 S.E.2d at 315. "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998) (quoting *In re Banks*, 295 N.C. 236, 239–40, 244 S.E.2d 386, 388–89 (1978)).

N.C. Gen. Stat. § 20-179(c) defines a "prior [DWI] conviction" as a "grossly aggravating factor[ ]" for enhanced sentencing purposes if "[t]he conviction occurred within seven years before the date of the offense for which the defendant is being sentenced[.]" N.C. Gen. Stat. § 20-179(c)(1)(a) (2017). N.C. Gen. Stat. § 20-4.01 provides in relevant part that "[u]nless the context requires otherwise, the following definitions apply throughout . . . Chapter [20] . . . ." Subdivision (4a)(a)(1) of that section defines "[c]onviction" in relevant part as "[a] *final* conviction of a criminal offense[.]" N.C. Gen. Stat. § 20-4.01(4a)(a)(1) (2017) (emphasis added). Defendant argues that because his prior DWI conviction was pending on appeal at the time of the sentencing hearing, the prior conviction was not "final" under Chapter 20's definition of a "conviction" and it thus did not constitute a "prior conviction" under N.C. Gen. Stat. § 20-179(c)(1)(a). We disagree.

Despite N.C. Gen. Stat. § 20-4.01(4a)(a)(1) defining a conviction as a "final" conviction, we believe the "context [of finding the existence of a grossly aggravating factor based upon a prior DWI conviction in superior court] requires," *id.* § 20-4.01, an interpretation that a "prior conviction" not be limited to only those not pending on direct appeal to the appellate courts. The plain and unambiguous language of the more specific statute of N.C. Gen. Stat. § 20-179(c)(1)(a) defines a "prior conviction" merely as a "conviction [that] occurred within seven years before" the later offense. Because there is no language limiting

that definition to a "final" conviction or only those not challenged on appeal, we have no authority to interpret the statute as imposing such a limitation.

Further, even if we found this statutory language ambiguous, we find support for our interpretation on the grounds that interpreting it otherwise would undermine the purpose behind enhancing a repeat DWI offender's sentence, as a person with a qualifying prior conviction appealed from superior court could be sentenced for a later conviction as though he or she had no prior conviction. Additionally, we note that if a person's sentence is enhanced based upon a prior DWI conviction that is later reversed on direct appeal, he or she is entitled to be resentenced at the proper offender level without that prior conviction. *See State v. Bidgood*, 144 N.C. App. 267, 276, 550 S.E.2d 198, 204 (2001) (remanding for resentencing on the proper prior record level when the defendant's sentence was enhanced based on a prior conviction that was subsequently reversed on appeal).

Therefore, the superior court properly concluded that defendant's prior DWI conviction, despite it being pending on appeal, constituted a "prior conviction" under N.C. Gen. Stat. § 20-179(c)(1). Accordingly, we hold the superior court properly found the existence of a grossly aggravating factor based on the prior DWI conviction and affirm its sentence.

As a secondary matter, we note that this Court has since filed an opinion adjudicating defendant's appeal from his prior DWI conviction. *See State v. Cole*, No. 17-732 (N.C. App. Aug. 21, 2018) (unpublished). While we found no error in part, we also remanded in part for resentencing and for the entry of a suppression order, *id.* slip op. at 19, with instructions for the superior court to resolve a conflict in the testimony presented at the suppression hearing, *id.* slip op. at 10–12. We reiterate that if this DWI conviction is later overturned, defendant is entitled to be resentenced at the appropriate offender level and the entry of a properly reflective judgment.

VI. Conclusion

The superior court properly denied defendant's motion to dismiss the indictment for lack of jurisdiction because that charge was no longer pending or valid in district court. The superior court properly refused to suppress the evidence obtained after the roadside breath test because its findings support a conclusion that, before that test, Officer Ray had objective reasonable suspicion to justify prolonging the initial traffic stop to investigate defendant's potential impairment. The superior court also properly refused to suppress the intoxilyzer results because

it properly concluded that Officer Ray's request that defendant provide another sample for the same breath test on a different machine was not a request for a "subsequent chemical analysis" triggering N.C. Gen. Stat. § 20-139.1(b5)'s re-advisement requirement. Absent error in these suppression rulings, the trial court did not commit plain error by admitting that evidence at trial. Finally, the superior court properly concluded that defendant's prior DWI conviction, despite it being pending on appeal, constituted a "prior conviction" under N.C. Gen. Stat. § 20-179(c)(1), and thus supported its finding of the existence of a grossly aggravating factor for enhanced sentencing purposes. Accordingly, we hold that defendant received a fair trial and sentence, free of error.

NO ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
DONALD LEON GORHAM, II

No. COA18-235

Filed 20 November 2018

Motor Vehicles—speeding to elude arrest—property damage exceeding $1,000—sufficiency of evidence

In a prosecution for speeding to elude arrest, there was sufficient evidence to support the essential element of property damage exceeding $1,000 where defendant drove through a house as he wrecked the car. N.C.G.S. § 20-141.5 does not specifically define how to determine the value of the "property damage"; it could be either the cost to repair the damage or the decrease in the value of the damaged property as a whole. Although a police officer did not testify as an expert, the jury could bring to the question their common sense and their knowledge gained from their experiences of everyday life.

Appeal by defendant from judgment entered 7 November 2017 by Judge Casey M. Viser in Superior Court, Rockingham County. Heard in the Court of Appeals 3 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Gail E. Carelli, for the State.

Winifred H. Dillon, for defendant-appellant.

STROUD, Judge.

Defendant appeals from his conviction of felony speeding to elude arrest and contends the trial court should have granted his motion to dismiss because the State failed to present sufficient evidence he caused over $1,000.00 worth of property damage. Even though the police officer was not testifying as an expert in estimating property damage, his lay opinion testimony, as well as the other evidence, is substantial evidence to survive defendant's motion to dismiss. In addition, both parties agree that defendant was sentenced at the wrong prior record level. We find no error in part and vacate and remand for resentencing at the correct record level.

I. Background

On the night of 9 June 2017, defendant drove to a friend's house and drank alcohol on the front porch with several people. Around 10:00 p.m. that night, Officer Revis of the Reidsville Police Department was investigating a stolen Chevrolet Tahoe that matched the description of the vehicle defendant was driving. When Officer Revis spotted the parked vehicle, he stopped nearby and called for backup. When defendant got into his vehicle, Officer Revis immediately activated his blue lights, but defendant failed to stop. A prolonged chase ensued and defendant sped up to 80 miles per hour within the city limits of Reidsville. Defendant's vehicle struck a guardrail, but defendant continued to flee. The chase continued out of Rockingham County and into two other counties. Defendant drove his car into a residential neighborhood near Burlington and drove up a driveway and through a house. Defendant's vehicle went through the bedroom while a woman was lying in her bed with her head less than a foot away from where the vehicle passed through the house. Defendant continued driving and damaged a shed behind the house and continued to flee. At this point, officers ended the chase to assist the occupants of the house that defendant hit.

The following day, police went to the house where defendant had been drinking the night before and questioned defendant's friend and the friend's mother. While the police were present, defendant called this friend, who put the call on speakerphone. Defendant stated while on

speakerphone, "Yeah, I got away from them motherf*****s[.]" Defendant was indicted for felony fleeing to elude arrest, reckless driving, and as a habitual felon. At trial, the State dismissed the reckless driving charge. The jury found defendant guilty of felony fleeing to elude arrest and defendant pled guilty to being a habitual felon. The trial court sentenced defendant, and defendant gave notice of appeal in open court.

II. Motion to Dismiss

Defendant argues that the State failed to present sufficient evidence that defendant caused property damage in excess of $1,000.00, one of the aggravating factors for the speeding to elude arrest charge to be a felony under N.C. Gen. Stat. § 20-141.5.

> [A] motion [to dismiss] presents a question of law and is reviewed *de novo* on appeal. The question for this Court is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

State v. Norton, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011) (citations and quotation marks omitted).

Defendant was convicted of felony speeding to elude arrest which requires two or more aggravating factors:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> (1) *Speeding in excess of 15 miles per hour over the legal speed limit.*
>
> . . . .

(4) *Negligent driving leading to an accident causing:*

a. Property damage in excess of one thousand dollars ($1,000); or

b. Personal injury.

N.C. Gen. Stat. § 20-141.5 (2017) (emphasis added).

The State relied on N.C. Gen. Stat. § 20-141.5(b)(1) ("Speeding in excess of 15 miles per hour over the legal speed limit.") and (4)(a) ("Negligent driving leading to an accident causing: a. Property damage in excess of one thousand dollars ($1,000)[.]") as the aggravating factors to elevate defendant's charge to a felony. The only element challenged by defendant is whether the evidence is sufficient to show that the value of the property damage exceeds $1,000.00. Defendant does not allege insufficiency of the evidence regarding any other element of the crime.

Defendant frames his issue on appeal as sufficiency of the evidence, but his argument focuses mostly on Officer Revis's qualification to give opinion testimony on the value of the property damages. He argues that "the only evidence presented by the State as to the value of the property damage resulting from the chase and collisions was Officer Revis's uncorroborated opinion testimony that the damage to the guardrail, the Tahoe, and the house and shed in Burlington exceeded $1,000."

First, Officer Revis's testimony was not the "only evidence presented" of the property damage; the State also presented pictures and video showing the damaged property. But Officer Revis's testimony was the only evidence assigning any value to the damages. Defendant's argument fails to address that he did not object to Officer Revis's testimony, so he did not preserve the issue of Officer Revis's *qualification* to render an opinion on the value of the property damage, either as an expert or lay witness. Therefore, we consider only the sufficiency of the evidence showing damages in excess of $1,000.00.

Defendant notes that "[t]he question of what and how much evidence is required to prove the value of damages to satisfy N.C. Gen. Stat. § 20-141.5(b)(4)(a) has not been addressed by our appellate courts." Defendant is correct. Most cases which address the evidence required to prove value of property, where the elements of the crime include a specific value, have been addressed under N.C. Gen Stat. §14-72(a), which elevates misdemeanor larceny of goods to a felony charge when the value of the property stolen exceeds $1,000.00. N.C. Gen. Stat. § 14-72(a). In that context, this Court has stated:

> Value as used in N.C. Gen. Stat. § 14-72 means fair market value. Stolen property's fair market value is the item's reasonable selling price at the time and place of the theft, and in the condition in which it was when stolen. It is not necessary that a witness be an expert in order to give his opinion as to value. A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property, personal property, or services.

State v. Redman, 224 N.C. App. 363, 366, 736 S.E.2d 545, 549 (2012) (quotation marks, citations, and brackets omitted).

Although cases addressing larceny of property with a fair market value over $1,000.00 are helpful, they are not directly analogous on the evidence required to show the value of "property damage." The issue of "Property damage in excess of one thousand dollars ($1,000)" is distinct from the fair market value of an item of property. *See* N.C. Gen. Stat. § 20-141.5(b)(4)(a). In cases under N.C. Gen. Stat. § 14-72(a), the value is based upon the fair market value of the property stolen since it has been entirely lost. In cases under N.C. Gen. Stat. § 20-141.5(b)(4)(a), the property has not been removed from its lawful owner; it has just been damaged, even if the damage is so severe as to destroy it. N.C. Gen. Stat. § 20-141.5(b)(4)(a) does not specify whether the $1,000.00 valuation of "property damage" is based upon the fair market value of the property in its damaged condition compared to its original condition or upon the cost to repair the damaged property. These values may differ. For example, N.C. Gen. Stat. § 14-72.8 makes larceny of a motor vehicle part a Class I felony "if the *cost of repairing* the motor vehicle is one thousand dollars ($1,000) or more." N.C. Gen. Stat. § 14-72.8 (2017) (emphasis added). Under this statute, it would appear that if a defendant removed a part worth $500.00 from a vehicle, but the cost to repair the vehicle by replacing the missing part would be over $1,000.00 because of the labor to install the new part, the larceny would be elevated to a Class I felony.[1] N.C. Gen. Stat. § 14-72.8 expressly does not depend upon the fair market value of the car itself in its damaged condition as compared to its original condition or even just the value of the stolen part. The change in the fair market value of the car with the missing part from the value of the car in its original condition may be far less than $1,000.00, depending upon the original condition of the car and the part stolen.

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1. No cases have addressed N.C. Gen. Stat. § 14-72.8.

Another crime which includes an element of value of property damage is defined in N.C. Gen. Stat. § 14-160, regarding "willful and wanton injury to personal property." It elevates the crime to a Class 1 misdemeanor if the injury to the property causes "damage in an amount in excess of two hundred dollars ($200.00)." N.C. Gen. Stat. § 14-160(b). While other cases have addressed this issue tangentially, *State v. Edmondson*, 70 N.C. App. 426, 320 S.E.2d 315 (1984), *aff'd*, 316 N.C. 187, 340 S.E.2d 110 (1986), directly addressed the evidence needed to show the valuation of the damage to personal property in excess of $200 under this statute.[2] In *Edmondson*, the State presented testimony and photographs showing the damage to a lumber company's premises when

> a truck . . . crashed into the back wall of the company sales offices. The door had been forced open and the offices ransacked. In the adjoining warehouse, a forklift had been used to break open the double doors leading to the sales offices. A five gallon can of roofing compound had been run over by the forklift, spilling the compound on the floor.

Id. at 426, 320 S.E.2d at 316. The defendant contended "there was no evidence presented as to the amount of damage done to the personal property[,]" but this Court determined the evidence to be sufficient to support property damages in excess of $200.00:

> After hearing all the evidence, and viewing photographs that showed extensive damage in the ransacked offices, the jury found that the damage done to the personal property exceeded $200. While there may not have been any precise evidence as to the amount of these damages the jury was free to exercise their own reason, common sense and knowledge acquired by their observation and experiences of everyday life.

Id. at 430, 320 S.E.2d at 318 (citation omitted).

Since N.C. Gen. Stat. § 20-141.5 does not specifically define how to determine the value of the "property damage," the value could be either the cost to repair the property damage or the decrease in value of the damaged property as a whole, depending upon the circumstances of the case. *See* N.C. Gen. Stat. § 20-141.5. Where the property is completely destroyed and has no value after the damage, the value of the property

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2. *State v. Edmondson* does not specifically state that the defendant was charged under N.C. Gen. Stat. § 14-160, but this is evident from the description of the crime in the opinion.

damage would likely be its fair market value in its original condition, since it is a total loss. But, in this case, we need not decide that issue, since defendant did not challenge the jury instructions, and the evidence was more than sufficient to support either interpretation of the amount of "property damage" caused by defendant.

Defendant relies on *State v. Rahaman*, 202 N.C. App. 36, 688 S.E.2d 58 (2010), to support his claim that "[t]here is no evidence in the record that Officer Revis had this specialized knowledge, or that Officer Revis was otherwise qualified to render an opinion as to the amount of the damage to the house, shed, and Tahoe." But defendant's reliance on *Rahaman* is misplaced. In *Rahaman*, the defendant objected to the police officer's lay opinion testimony regarding the value of stolen truck. *Id.* at 48, 688 S.E.2d at 67. Here, defendant did not object to Officer Revis's testimony and has not argued plain error on appeal. On the sufficiency of the evidence, in *Rahaman* this Court noted that "[t]he State is not required to produce direct evidence of value to support the conclusion that the stolen property was worth over $1,000.00, provided that the jury is not left to speculate as to the value of the item." *Id.* at 47, 688 S.E.2d at 66 (citation, quotation marks, and ellipsis omitted). The Court held that the officer's testimony was properly admitted and noted that "the basis or circumstances behind a non-expert opinion affect only the weight of the evidence, not its admissibility." *Id.* at 49, 688 S.E.2d at 67 (citation and brackets omitted). The officer's testimony, along with the other evidence in *Rahaman*, was "sufficient to establish that the vehicle stolen was valued in excess of $1,000.00 at the time of the theft, and, therefore, the trial court did not err in denying defendant's motion to dismiss." *Id.* at 48, 688 S.E.2d at 67.

Here, Officer Revis testified without objection:

> We got towards N.C.-14 and North Scales Street, where the Defendant wrecked the vehicle into the guardrail causing damage to the guardrail; over a thousand dollars' worth of property damage, damaged the Tahoe, but decided to continue to keep fleeing from me while I was still behind him with siren and lights on trying to stop the vehicle.

When asked directly "did [defendant] drive negligently in a manner that led to an accident causing property damage in the excess of $1,000?" Officer Revis responded, "Yes, sir." The State also introduced pictures of the damaged house and a video of the chase and published these to the jury. The testimony of Officer Revis and the photos and video are substantial evidence that a reasonable mind might accept as adequate

to support the conclusion that defendant caused property damage in excess of $1,000.00, whether as a repair cost or as a reduction in fair market value of the damaged properties. Besides hitting the guardrail, defendant drove *through* a house and damaged a nearby shed. The jury could use common sense and knowledge from their "experiences of everyday life" to determine the damages from driving through a house alone would be in excess of $1,000.00. *See Edmondson*, 70 N.C. App at 430, 320 S.E.2d at 318.

III. Prior Record Level

Defendant argues and the State concedes that the trial court erred in sentencing defendant at a prior record level of 4 when his correct prior record level is level 3. This error was prejudicial, so defendant is entitled to a new sentencing hearing.

IV. Conclusion

The trial court did not err in denying defendant's motion to dismiss, but we vacate and remand for a new sentencing hearing for defendant at prior record level 3.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges DILLON and BERGER concur.

STATE OF NORTH CAROLINA
v.
KELVIN OYAKHILOME IRABOR

No. COA18-243

Filed 20 November 2018

Criminal Law—self-defense—jury instructions—stand-your-ground provision

Failure to include the relevant stand-your-ground provision in the jury instructions in a homicide prosecution constituted prejudicial error and warranted a new trial. The trial court had agreed to give a pattern jury instruction which included duty to retreat and stand-your-ground provisions but failed to do so. If the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State's evidence is contradictory.

Appeal by defendant from judgments entered 2 February 2017 by Judge Robert T. Sumner in Buncombe County Superior Court. Heard in the Court of Appeals 3 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

CALABRIA, Judge.

Kelvin Oyakhilome Irabor ("defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling. After careful review, we conclude that the trial court committed prejudicial error by failing to include the relevant no duty to retreat and stand-your-ground provisions from its jury instructions on self-defense. Therefore, we reverse the trial court's judgment and remand for a new trial.

I. Factual and Procedural Background

In October 2015, defendant lived in apartment 14E in the Oak Knoll apartment complex in Asheville, along with his child, London, London's mother, Denise Williams ("Williams"), and Williams's sister, Shamica Robinson ("Robinson"). Sometimes Dondre Nelson ("Nelson"), who was a friend of one of Robinson's other sisters, stayed with them in apartment 14E.

Defendant testified that he had known Nelson for some time and had befriended Nelson to avoid becoming a "target." According to defendant, Nelson was a high-ranking member of the Blood gang, which was highly active in the Oak Knoll area, and had frequently robbed individuals around the Oak Knoll apartments. Nelson had gained this status by killing a rival gang member in Atlanta, Georgia. Defendant also testified that he knew Nelson always carried a gun on his person, and Nelson had informed defendant that he had shot an individual for allegedly discharging a weapon into the Oak Knoll apartments. Since defendant knew Nelson's reputation, he had hoped his friendship with Nelson would ensure that he did not become a target of gang activity.

On 9 October 2015, defendant rode with Nelson to an ABC store, where they met Jenna Ray ("Ray"), with whom Nelson apparently

had a relationship. After defendant and Nelson returned to Oak Knoll, Ray also arrived. Williams was angry when she saw Ray and was prepared to attack her. When defendant stopped her from attacking Ray, Williams became angry with defendant. Williams's niece, Gelisa Madden ("Madden"), attempted to intervene, striking defendant, who struck her back.

While defending himself from Madden, defendant released Williams, who went into apartment 14E and returned with a broomstick, with which she struck defendant. Defendant responded by drawing a firearm and chasing Williams. While chasing her, he fired three shots. Williams fled into apartment 14E, and a neighbor called Nelson. One of defendant's shots allegedly struck the door of apartment 14E, where Nelson's daughter was staying at the time.

After chasing Williams, defendant left Oak Knoll for several hours. He called multiple people asking for a ride and eventually reached Nelson. Nelson was furious and refused to give him a ride. Defendant decided to walk back to Oak Knoll instead. When defendant returned to Oak Knoll, he saw Nelson and two others standing outside apartment 14E. Fearing what Nelson might do to him, defendant went to another apartment first, where he talked with Jerome Smith ("Smith"). Smith told defendant that Nelson was upset with defendant for firing a shot into apartment 14E, where Nelson's daughter was staying, and warned defendant to be careful. Defendant borrowed Smith's gun for protection.

After defendant left Smith's apartment, he walked along the sidewalk, heading back to apartment 14E. As defendant approached the apartment, Nelson called out to defendant and accused him of shooting at Nelson's daughter, which defendant denied. Nelson responded by telling defendant "this is war, empty your pocket," while advancing towards defendant. Fearing Nelson would attack and rob him, defendant pulled the gun out of his pocket, "racked it," and told Nelson to back up. Nelson continued to advance, and defendant fired two warning shots into the ground; however, Nelson remained undeterred. Nelson then lunged at defendant, and defendant fatally shot Nelson. Defendant then fled, dropping Smith's gun into the bushes.

Defendant was indicted for the first-degree murder of Nelson, assault on a female of Madden, assault with a deadly weapon with intent to kill of Williams, and discharging a firearm into an occupied dwelling. Trial commenced during the 23 January 2017 session of Buncombe County Superior Court. Following the State's presentation of evidence, defendant presented evidence, including his own testimony.

At the charge conference, the trial court agreed to deliver N.C.P.I.–Crim. 206.10, the pattern jury instruction on first-degree murder and lesser-included offenses. This instruction includes instructions on self-defense and a "no duty to retreat" provision as part of the explanation of self-defense. *See* N.C.P.I.–Crim. 206.10 (June 2014) (providing that a "defendant has no duty to retreat in a place where the defendant has a lawful right to be"). N.C.P.I.–Crim. 206.10 also incorporates by reference a "stand-your-ground" provision found in N.C.P.I.–Crim. 308.10. *See id.* 308.10 (June 2017) (providing that "[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force") (second set of brackets in original).

Although the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the "no duty to retreat" language from its actual instructions without prior notice to the parties and failed to give any part of the "stand-your-ground" instruction. Defense counsel failed to object to the instructions as given.

The jury returned verdicts finding defendant guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling, and not guilty of assault on a female. The trial court sentenced defendant to a minimum of 200 and a maximum of 252 months for second-degree murder, and a minimum of 55 and a maximum of 78 months for discharging a firearm and assault, to be served consecutively in the custody of the North Carolina Division of Adult Correction.

Defendant appeals.

II. Self-Defense Instruction

Defendant contends the trial court erroneously omitted the relevant no duty to retreat and stand-your-ground provisions from the jury instructions on self-defense, which constituted reversible error. We agree.

A. Standard of Review

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense." *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (citation omitted). "In determining whether an instruction on . . . self-defense must be given, the evidence is to be viewed in the light most favorable to the defendant." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449

(2010) (citation omitted). Whether the trial court erred in instructing the jury is a question of law, reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

B. Analysis

Self-defense is an affirmative defense, whereby "the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * * .' " *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975). Our amended "statutes provide two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability." *State v. Lee*, 370 N.C. 671, 674, 811 S.E.2d 563, 566 (2018). N.C. Gen. Stat. § 14-51.3(a) states, in relevant part:

> A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be* if . . . the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

N.C. Gen. Stat. § 14-51.3(a) (2017) (emphasis added).

On appeal, the State contends that defendant was not entitled to an instruction on self-defense for several reasons. First, the State asserts defendant failed to present sufficient evidence to support defendant's actual and reasonable belief that shooting Nelson was necessary to protect himself from imminent death or great bodily harm. Second, the State argues since defendant was the initial aggressor, he lost the protections of the self-defense statute. Therefore, according to the State, the trial court was not required to instruct the jury on self-defense and any error in the self-defense instruction was harmless. We disagree.

Viewed in the light most favorable to defendant, the evidence supports a jury instruction on self-defense, and the trial court agreed to give it. Defendant was fully aware of Nelson's violent and dangerous propensities on the night of the shooting. According to defendant's testimony, Nelson had achieved his high-ranking membership in the Blood gang by killing a rival gang member. In addition, Nelson stated that he shot an individual who he believed had shot into the Oak Knoll apartments.

Furthermore, defendant observed Nelson robbing individuals in the apartments on multiple occasions and testified that, to his knowledge, Nelson always carried a gun with him.

Defendant's knowledge of Nelson's violent propensities, being armed, and prior acts supports the trial court's finding that defendant reasonably believed it was necessary to use deadly force to save himself from death or great bodily harm. *See State v. Strickland*, 346 N.C. 443, 459, 448 S.E.2d 194, 203 (1997) ("[E]vidence of prior violent acts by the victim or of the victim's reputation for violence may . . . prove that a defendant had a reasonable apprehension of fear of the victim." (citation omitted)); *see also* N.C. Gen. Stat. § 14-51.3(a).

Prior to the shooting, defendant offered evidence that Nelson stood outside Apartment 14E, where defendant lived, with two other individuals and was waiting to confront defendant about allegedly shooting a gun towards Nelson's daughter. Defendant also testified he borrowed a gun from Smith for protection. When Nelson noticed defendant walking towards his apartment, Nelson told defendant "this is war, empty your pocket"; continued to advance upon defendant after defendant fired two warning shots; and eventually lunged at defendant while reaching behind his back towards his waistband.

By viewing the evidence in the light most favorable to defendant, a jury could conclude that defendant actually and reasonably believed that Nelson was about to shoot him and that it was necessary for defendant to use deadly force to protect himself. The fact that defendant armed himself and did not affirmatively avoid the altercation does not make defendant the initial aggressor. *See State v. Vaughn*, 227 N.C. App. 198, 204, 742 S.E.2d 276, 279-80 (2013). Further, defendant's earlier conduct towards Williams does not make him an aggressor against Nelson.

When law enforcement officers searched Nelson's body, they did not find a gun. However, evidence presented at trial, when viewed in the light most favorable to defendant, suggested that Nelson may have been armed. Law enforcement officers testified that neither Nelson's wallet or cell phone were found on his person. Yet, Nelson had used his cell phone earlier that evening, and a receipt from Walmart was found in Nelson's pocket. Witnesses also reported seeing an unidentified female fleeing the area that night with a gun.

From this evidence, a jury could reasonably infer that defendant reasonably believed Nelson was armed at the time of the altercation. Therefore, defendant was still entitled to protect himself if he reasonably believed Nelson was armed and intended to inflict death or serious

bodily injury on defendant. *See State v. Spaulding*, 298 N.C. 149, 157, 257 S.E.2d 391, 396 (1979) (noting that "an action by the victim as if to reach for a weapon was sufficient to justify an instruction on self-defense" (citation omitted)).

The State further contends that defendant's testimony was inconsistent and, thus, insufficient. However, "if the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given *even though the State's evidence is contradictory*." *Moore*, 363 N.C. at 796, 688 S.E.2d at 449 (emphasis added) (citation omitted); *see also State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) ("Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or [there are] discrepancies in defendant's evidence." (citations omitted)). Because the evidence, when viewed in the light most favorable to defendant, supports an instruction on self-defense, the trial court correctly gave the self-defense instruction under N.C.P.I.–Crim. 206.10. *See Allred*, 129 N.C. App. at 235, 498 S.E.2d at 206.

However, the trial court erred by failing to include the relevant no duty to retreat and stand-your-ground provisions after agreeing to provide the instructions. We initially note that this issue is preserved for appellate review. *See Lee*, 370 N.C. at 676, 811 S.E.2d at 567 ("When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection."). Here, the trial court agreed to give the pattern jury instruction under N.C.P.I.–Crim. 206.10, which includes the relevant no duty to retreat and stand-your-ground provisions; however, the trial court failed to include these provisions in its charge to the jury. Therefore, pursuant to *Lee*, this issue is preserved. *See id.*

Our Supreme Court recently affirmed that "a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." *State v. Bass*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Oct. 26, 2018) (No. 208A17) (emphasis in original). Failure to include the relevant stand-your-ground provision constitutes prejudicial error and warrants a new trial. *Lee*, 370 N.C. at 671-72, 811 S.E.2d at 564 (holding the omission of the stand-your-ground provision amounted to an "inaccurate and misleading statement of the law[,]" requiring a new trial). Defendant is entitled to a new trial with proper jury instructions.

III. Conclusion

The trial court committed prejudicial error by failing to include the relevant no duty to retreat and stand-your-ground provisions in the agreed-upon jury instructions on self-defense. Therefore, we reverse the judgment of the trial court and remand for a new trial. *See id.* Because we have reversed and remanded for a new trial, we need not address defendant's remaining arguments on appeal.

NEW TRIAL.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
BARBARA JEAN MYERS McNEIL

No. COA17-1404

Filed 20 November 2018

1. Appeal and Error—record on appeal—district court judgment—notice of appeal to superior court—petition for writ of certiorari

The Court of Appeals treated defendant's appeal from the superior court's judgment of driving while impaired (DWI) as a petition for writ of certiorari—and granted said petition—where the record did not contain the district court's DWI judgment or the notice of appeal to the superior court and thus failed to establish that the superior court had jurisdiction.

2. Search and Seizure—traffic stop—extension—ordinary inquiries incident to stop

A traffic stop of defendant was not unlawfully extended where an officer was investigating whether defendant's vehicle was being operated without a valid license, made ordinary inquiries incident to the traffic stop, and acquired reasonable suspicion that defendant was operating the vehicle while impaired.

Judge MURPHY dissenting.

STATE v. MYERS McNEIL

[262 N.C. App. 497 (2018)]

Appeal by defendant from judgment entered 17 August 2017 by Judge Elaine M. O'Neal in Wake County Superior Court. Heard in the Court of Appeals 5 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Morgan & Carter PLLC, by Michelle F. Lynch, for defendant-appellant.

ZACHARY, Judge.

Defendant Barbara Jean Myers McNeil argues that the superior court erred in denying her Motion to Suppress the evidence of her Driving While Impaired offense because it was obtained as a result of an officer's unlawful extension of the initial traffic stop, in violation of the Fourth Amendment. Because the record is devoid of the initial Driving While Impaired judgment in the district court and the notice of appeal to the superior court, the record fails to establish that the superior court had jurisdiction in the instant case. Nevertheless, we elect to treat Defendant's appeal as a petition for writ of certiorari, and affirm.

Background

On 18 May 2016, Officer Shaun Henry and Officer Lane of the Raleigh Police Department were on duty "in a stationary position in a marked patrol vehicle" running license tags of vehicles that passed. At one point, a vehicle drove past the officers and when they ran the vehicle's tag information through the DCI program, they learned that the registered owner of the vehicle was a male with a suspended license. The officers then stopped the vehicle based on their suspicion that it was being driven without a valid license. Officer Henry stated that he only intended to "[i]dentify the driver of the vehicle to see first if the owner was in the car, if they were driving, who the driver of the vehicle was."

As Officer Henry approached the vehicle, he "immediately" saw that Defendant, a female, was in the driver's seat and that there was a female passenger next to her. When Officer Henry reached the driver's window, Defendant did "not acknowledge [his] presence" or roll the window down, but was instead "fumbling through what appeared to be a wallet or a small clutch." Officer Henry testified that "[i]ndicators of impaired driving are inability to locate information pertinent to a traffic stop, looking through a wallet, passing over her driver's license or using—producing a debit card or credit card in place of a driver's license." Officer

Henry "tapped on the window and asked if [Defendant] could roll the window down."

Defendant eventually rolled her window down, but only about two inches. Officer Henry testified that "it's kind of a red flag if a window is rolled down very minimally to the point where either words cannot be exchanged, you can barely hear what anyone is saying, or that someone is attempting to mask an odor coming from the vehicle." Officer Henry testified that he

> asked [Defendant] if she could roll [the window] down all the way. She stated she could hear me just fine. I introduced myself[.] I explained to her that the registered owner of the vehicle did have a suspended driver's license. And she admitted that the car was not hers and made reference to it being . . . her husband's and [that] she gets pulled over all the time for that same reason.

Officer Henry then asked Defendant "if she had her driver's license on her[,]" to which Defendant replied that she did. However, Officer Henry noticed that Defendant "kept fumbling through the same amount of cards over and over again inside that small wallet, mumbling that she did have a license and it was active."

In addition, Officer Henry "had to get inside th[e] [two inch window] crack in order to hear [Defendant] talking because she was looking down and mumbling down into, I guess, her lap where she was—so I could barely hear what she was saying." In doing so, he "began to observe the odor of alcohol coming from the vehicle" as well as "[a] slight slur to her speech." At that point, Officer Henry testified that his investigation changed "from a Chapter 20, or driving, to an impaired driving investigation based on that odor of alcohol and the slurred speech."

When Officer Henry confronted Defendant about the smell of alcohol, "her passenger interjected stating that she was drinking the alcohol and that was what I smelled." He asked Defendant to roll the window all the way down so that he could hear her. Defendant "muttered something else under her breath" and Officer Henry asked her to step out of the vehicle. Officer Henry instructed Defendant to exit the vehicle in order "to separate her from the odor of alcohol her passenger had admitted to consuming. I wanted to see if having her step out would separate her from that odor that I was detecting." Defendant was then subjected to sobriety tests and subsequently charged with Driving While Impaired. Dash-cam video shows that roughly two minutes and forty-six seconds had passed between the time Officer Henry initially approached the vehicle and the time that he asked Defendant to exit the vehicle.

Defendant filed a Motion to Suppress the evidence of the Driving While Impaired offense on the grounds that Officer Henry had unlawfully extended her roadside detention in violation of the Fourth Amendment. At the hearing, Defendant argued that Officer Henry was required to cease his investigation once he saw that the driver of the vehicle was Defendant—a woman—in that the sole "purpose for the stop [was] to address a male driver with a revoked license." The State countered that Officer Henry developed "reasonable articulable suspicion" to believe that Defendant was intoxicated during the initial stop, and that he was therefore permitted to extend the stop in order to investigate that suspicion.

The trial court orally denied Defendant's Motion to Suppress from the bench without making specific findings on the matter, or entering a written order. Defendant properly renewed her Fourth Amendment objection at the time the evidence was presented at trial, which the trial court again overruled. The jury thereafter found Defendant guilty of Driving While Impaired. Defendant timely appealed.

On appeal, Defendant argues that the trial court erred in denying her Motion to Suppress because "[o]nce the underlying reason for the stop of [Defendant] had been satisfied, the stop should not have been prolonged and became unlawful at that point." Accordingly, Defendant maintains that "all evidence obtained after that point should have been suppressed." We disagree.

Jurisdiction

[1] We initially address whether this Court has jurisdiction over Defendant's appeal from the superior court's judgment of misdemeanor Driving While Impaired.

"The superior court has no jurisdiction to try a defendant on a warrant for a misdemeanor charge unless [she] is first tried, convicted and sentenced in district court and then appeals that judgment for a trial *de novo* in superior court." *State v. Felmet*, 302 N.C. 173, 175, 273 S.E.2d 708, 710 (1981) (citing *State v. Hall*, 240 N.C. 109, 81 S.E.2d 189 (1954)). In the event that "the record is silent and the appellate court is unable to determine whether the [superior court] had jurisdiction, the appeal should be dismissed." *Id.* at 176, 273 S.E.2d at 711 (citing *State v. Hunter*, 245 N.C. 607, 96 S.E.2d 840 (1957); *State v. Banks*, 241 N.C. 572, 86 S.E.2d 76 (1955); and *State v. Patterson*, 222 N.C. 179, 22 S.E.2d 267 (1942)).

In the instant case, the district court's Driving While Impaired judgment, if there was one, is not included in the record on appeal. Nor

is there any record of notice of appeal from the district court to the superior court. Therefore, the record is silent as to whether Defendant was indeed first convicted in district court and thereafter properly appealed that judgment to superior court. We are thus unable to determine whether the superior court had jurisdiction when it entered judgment against Defendant. *See Felmet*, 302 N.C. at 176, 273 S.E.2d at 711; *State v. Phillips*, 149 N.C. App. 310, 313-14, 560 S.E.2d 852, 855, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002).

Nevertheless, this Court has the option "to exercise our discretion to treat [D]efendant's appeal as a petition for certiorari" in order to reach the merits of her arguments. *Phillips*, 149 N.C. App. at 314, 560 S.E.2d at 855 (citing N.C. Gen. Stat. § 7A-32(c) (additional citations omitted)). In the instant case, while the district court's judgment and the notice of appeal to the superior court therefrom are not included in the record on appeal, we note that a district court proceeding is in fact alluded to in the record. The district court's order indicates that Defendant was found guilty of Driving While Impaired, but references an unattached "DWI judgment," which is not included in the record. Moreover, the State has not disputed that the superior court had jurisdiction in the instant case. Under these circumstances, we elect to treat Defendant's appeal as a petition for certiorari, and grant the same. *See id.*

Merits of Defendant's Appeal

I. Standard of Review

Our review of a trial court's order denying a defendant's motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Whether those facts are sufficient to support the conclusion that an "officer had reasonable suspicion to detain a defendant is reviewable *de novo*." *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001) (citing *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001)). However, where the trial court has not made findings of fact, "[i]f there is no conflict in the evidence on a fact, failure to find that fact is not error." *State v. Smith*, 135 N.C. App. 377, 380, 520 S.E.2d 310, 312 (1999). "A finding may be implied by the trial court's denial of [a] defendant's motion to suppress where the evidence is uncontradicted." *Id.* (citing *State v. Cobb*, 295 N.C. 1, 18-19, 243 S.E.2d 759, 769 (1978)).

II. Discussion

[2] The Fourth Amendment to the United States Constitution requires that an officer's "investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). The reasonable suspicion standard requires that "an officer simply must 'reasonably conclude in light of his experience that criminal activity may be afoot.' The officer 'must be able to point to specific and articulable facts,' and to 'rational inferences from those facts,' that justify the . . . seizure." *State v. Bullock*, ___ N.C. ___, ___, 805 S.E.2d 671, 674 (2017) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 21, 20 L. Ed. 2d 889, 911, 906 (1968)) (ellipses omitted). We have held that "when a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop." *State v. Hess*, 185 N.C. App. 530, 534, 648 S.E.2d 913, 917 (2007).

That a traffic stop is justified at its inception, however, does not afford the officer an unrestrained encounter with the individual. It is well established that "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop[.]" *Bullock*, ___ N.C. at ___, 805 S.E.2d at 673 (citing *Rodriguez v. United States*, 575 U.S. ___, ___, 191 L. Ed. 2d 492, 499 (2015)). "Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose." *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 498 (citations, quotation marks, and alteration omitted). "Authority for [a] seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* at ___, 191 L. Ed. 2d at 498 (citation omitted).

Nevertheless, it is entirely permissible for an officer to "conduct certain unrelated checks during an otherwise lawful traffic stop" so long as the "unrelated investigations" do not prolong "the time reasonably required to complete the mission" of the stop. *Id.* at ___, 191 L. Ed. 2d at 499 (brackets omitted). Otherwise, the only event in which an officer will be permitted to prolong his detention of an individual is where "reasonable suspicion of another crime arose before that mission was completed[.]" *Bullock*, ___ N.C. at ___, 805 S.E.2d at 673 (citing *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499).

In the instant case, Defendant argues that "[w]hile the officers might have had reasonable suspicion when they stopped the vehicle

[D]efendant was driving, the traffic stop became unlawful when it was verified that the male owner was not driving the vehicle." We disagree.

We first note that Defendant's argument is based upon a basic erroneous assumption: that a police officer can discern the gender of a driver from a distance based simply upon outward appearance. Not all men wear stereotypical "male" hairstyles nor do they all wear "male" clothing. The driver's license includes a physical description of the driver, including "sex." Until Officer Henry had seen Defendant's driver's license, he had not confirmed that the person driving the car was female and not its owner. While he was waiting for her to find her license, he noticed her difficulty with her wallet, the odor of alcohol, and her slurred speech.

In any event, the time needed to complete an officer's mission will always include time for the " 'ordinary inquiries incident to the traffic stop.' " *Id.* at ___, 805 S.E.2d at 673 (quoting *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499 (brackets, citation, and internal quotation marks omitted)). Such ordinary "inquiries include 'checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.' " *Id.* at ___, 805 S.E.2d at 673 (quoting *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499). Regardless of an officer's precise *reason* for initially stopping a vehicle, "database searches of driver's licenses, warrants, vehicle registrations, and proof of insurance all fall within the mission of a traffic stop." *State v. Campola*, ___ N.C. App. ___, ___, 812 S.E.2d 681, 688 (2018) (citation omitted).

Defendant cites no authority for her proposition that Officer Henry's "mission" in the instant case must have been limited solely to verifying "that the male owner was not driving the vehicle." Rather, Officer Henry's "mission" upon stopping Defendant's vehicle appropriately encompassed the two minutes and forty-six seconds' worth of "ordinary inquiries" incident to any traffic stop, including conversing with Defendant in order to inform her of the basis for the stop, asking Defendant for her driver's license, and checking that the vehicle's registration and insurance had not expired. *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499; *cf. State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009) ("[A]n initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration."). Thus, Officer Henry was not, as Defendant suggests, required to return to his vehicle at the moment he saw that a female, rather than a male, was driving the vehicle, nor upon approaching Defendant and learning that her husband was the owner of the car whose license was suspended.

The routine information that Officer Henry sought to obtain from Defendant "was simply time spent pursuing the mission of the stop." *Bullock*, ___ N.C. at ___, 805 S.E.2d at 676. During the course of that mission, Defendant avoided rolling her window all the way down, and Officer Henry also noticed that Defendant "kept fumbling through the same amount of cards over and over again" in an attempt to find her license. Meanwhile, Officer Henry could barely hear what Defendant was saying because she was "mumbling" and had "[a] slight slur to her speech." This prompted Officer Henry to lean in very closely to the window, at which point he smelled "the odor of alcohol coming from the vehicle." Despite Defendant's passenger providing an excuse for the smell, such circumstances, along with his training and experience, provided Officer Henry with reasonable suspicion to believe that Defendant was intoxicated, warranting further investigation. *See*, *e.g.*, *Farrell v. Thomas*, 247 N.C. App. 64, 68, 784 S.E.2d 657, 660, *appeal dismissed*, 794 S.E.2d 318 (2016) ("[Defendant's] glassy, bloodshot eyes and slurred speech alone created a strong suspicion that [defendant] might be impaired."); *State v. Veal*, 234 N.C. App. 570, 579, 760 S.E.2d 43, 49 (2014) ("Officer Cloer's observations during the . . . encounter (the odor of alcohol and an unopened container) established reasonable suspicion to further detain and investigate the defendant.").

Because Officer Henry developed reasonable suspicion of a new offense while he was in the process of completing his original mission in stopping Defendant's vehicle, the Fourth Amendment clock was in essence "re-set" so as to permit him to extend the detention in order to inquire about that new violation. *See Campola*, ___ N.C. App. at ___, 812 S.E.2d at 691. Accordingly, the trial court properly denied Defendant's Motion to Suppress.

Conclusion

We elect to treat Defendant's appeal as a petition for writ of certiorari. Officer Henry lawfully stopped Defendant's vehicle based on his reasonable suspicion that the vehicle was being operated by a driver without a valid license. Before Officer Henry completed the mission of the stop, he acquired reasonable suspicion that Defendant was operating the vehicle while impaired. Officer Henry was therefore permitted to extend his stop of Defendant in order to investigate the potential driving while impaired offense. The trial court did not err when it denied Defendant's Motion to Suppress the evidence obtained from that subsequent lawful detention. Accordingly, the trial court's denial of Defendant's Motion to Suppress is

AFFIRMED.

Judge STROUD concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority's opinion, specifically its decision to treat Defendant's appeal as a petition for writ of certiorari and allowing of the same. I agree with the Majority's analysis as to the lack of jurisdiction and its recognition that the district court clearly alludes to the existence of a "DWI judgment" in the judgment portion of the AOC-CR-500 Form, Rev. 12/13. However, based on the record before us it is impossible to determine if the superior court had jurisdiction to conduct a trial de novo.

In order for the superior court to have acquired jurisdiction over this matter, Defendant was required to give oral notice of appeal or written notice of appeal within 10 days of entry of the judgment:

> Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. *Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment.* Upon expiration of the 10-day period in which an appeal may be entered, if an appeal has been entered and not withdrawn, the clerk shall transfer the case to the district or superior court docket.

N.C.G.S. § 7A-290 (2017) (emphasis added). The otherwise completed and signed AOC-CR-500 Form containing the phrase "see DWI judgment[,]" contains a box for the district court judge to check in the event that Defendant has given oral notice of appeal. The district court judge left that box unchecked, indicating Defendant has not given oral notice of appeal in open court. Therefore, there is no showing that the superior court obtained jurisdiction over this matter by Defendant giving oral notice of appeal. As there was no oral notice of appeal, N.C.G.S. § 7A-290 requires a written notice, but the record lacks any evidence of written notice of appeal to the superior court. In sum, there is no showing in the record that Defendant filed a notice of appeal within 10 days of the "DWI judgment."

Not only is the record lacking the actual district court judgment, which I would entertain treating as a petition for writ of certiorari in this particular and individualized circumstance, it lacks a showing that Defendant gave timely notice of appeal to the superior court. If Defendant's appeal was not timely, then the superior court was without jurisdiction. As a result, I do not join the Majority in allowing a *sua sponte* petition for writ of certiorari. Defendant's case should be dismissed without a discussion of the merits of his appeal. I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 NOVEMBER 2018)

BOURQUE v. ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC No. 17-1054	Mecklenburg (17CVS2059)	Affirmed
BRYANT v. NATIONSTAR MORTG., LLC No. 17-592	Catawba (16CVS1395)	Affirmed
CARTER v. ST. AUGUSTINE'S UNIV. No. 17-1008	Wake (14CVS14273)	No error in part; vacated and remanded in part
EAST HARDWOOD CO., INC. v. TRADER No. 18-498	Carteret (17CVS1052)	Dismissed
GIESEKING v. TOWN OF GROVER No. 18-441	Cleveland (17CVS1137)	Reversed and Remanded
IN RE A.B.C. No. 18-492	Columbus (15JT29)	Vacated and Remanded
IN RE CB BLADEN SOLAR LLC No. 18-390	Property Tax Commission (17PTC0016)	Affirmed
IN RE COATS SOLAR LLC No. 18-392	Property Tax Commission (16PTC0745)	Affirmed
IN RE D.E. No. 18-321	Edgecombe (16JA91)	Vacated and Remanded
IN RE E.J.R. No. 18-270	Johnston (15JT142) (15JT143) (15JT208)	Affirmed
IN RE H.H. No. 18-628	Orange (16JT48)	Affirmed
IN RE HIGHWATER SOLAR 1, LLC No. 18-396	Property Tax Commission (16PTC0746)	Affirmed

IN RE INNOVATIVE SOLAR 63, LLC No. 18-391	Property Tax Commission (16PTC0744)	Affirmed
IN RE J.D.L.B. No. 18-579	Yadkin (16JT27)	Affirmed
IN RE J.N.M. No. 18-470	Wake (16JT42-43)	Affirmed
IN RE JACOB SOLAR, LLC No. 18-394	Property Tax Commission (16PTC0764)	Affirmed
IN RE K.B. No. 17-1395	Buncombe (17SPC1076)	Affirmed
IN RE KELFORD OWNER, LLC No. 18-389	Property Tax Commission (16PTC0743)	Affirmed
IN RE M.M.S.W. No. 18-522	Gaston (15JT81)	Vacated
IN RE MAXTON SOLAR 1, LLC No. 18-393	Property Tax Commission (16PTC0766)	Affirmed
IN RE SNOW CAMP LLC No. 18-388	Property Tax Commission (16PTC0765)	Affirmed
IN RE VANCE SOLAR 1, LLC No. 18-395	Property Tax Commission (17PTC0076)	Affirmed
INT'L PROP. DEV., LLC v. K CONSTR. & ROOFING, LLC No. 17-509	Cabarrus (15CVS500)	Dismissed in part; Affirmed in part.
KYLE BUSCH MOTORSPORTS, INC. v. BOSTON No. 18-426	Iredell (15CVS1932)	Affirmed
LAMPKINS v. N.C. DEP'T OF PUB. SAFETY No. 18-483	N.C. Industrial Commission (16-002598)	Affirmed
STATE v. APPLEWHITE No. 18-340	Wayne (01CRS57628) (01CRS57629)	VACATED AND REMANDED WITH INSTRUCTIONS.

STATE v. ARRINGTON No. 17-1364	Orange (14CRS51971)	No Error
STATE v. BETHEA No. 17-1419	Lee (15CRS52722)	Affirmed
STATE v. BROWN No. 18-467	Pitt (07CRS59512)	Reversed and Remanded.
STATE v. DAROSA No. 17-1267	Mecklenburg (16CRS201405) (16CRS201408-09)	No Error
STATE v. DUKES No. 18-274	Onslow (15CRS53596-97)	No Plain Error.
STATE v. FLORES No. 18-326	Cleveland (16CRS55447)	No error in part; Vacated in part
STATE v. FRAZIER No. 18-90	Onslow (16CRS27) (16CRS52122) (16CRS689) (17CRS537)	No Error
STATE v. GAME No. 18-306	Randolph (14CRS56200) (14CRS710389) (15CRS116)	Remanded for correction of clerical error.
STATE v. HAUSER No. 17-717	Forsyth (15CRS54968-69) (15CRS54973) (15CRS54975)	No Error
STATE v. JOHNSON No. 18-241	Cabarrus (16CRS55394)	No error in part, reversed in part.
STATE v. JOINER No. 18-186	McDowell (16CRS51395) (16CRS51400) (17CRS362)	No Error
STATE v. LITTLE No. 18-199	Forsyth (15CRS61566-67) (15CRS61598-600) (17CRS52552) (17CRS52554)	Affirmed
STATE v. PARRISH No. 18-77	Rowan (16CRS1296) (16CRS51618-19)	No Error

STATE v. PIERCE No. 18-358	Columbus (14CRS10) (14CRS11) (14CRS50009)	No Error
STATE v. PINNIX No. 17-1199	Forsyth (15CRS54961-62)	No Prejudicial Error
STATE v. ROBINSON No. 17-1262	Guilford (14CRS74998-99)	No Error
STATE v. WARREN No. 18-223	Pitt (16CRS50211) (16CRS50212)	No Prejudicial Error.
STATE v. WILLIAMS No. 18-402	Davie (15CRS51326)	No Error
STATE v. YOUNG No. 13-586-2	Wake (09CRS19207)	No Error in Part; Affirmed in Part.
WADHWANIA v. WAKE FOREST UNIV. BAPTIST MED. CTR. No. 18-252	Forsyth (16CVS3939)	Affirmed
WILDER v. LITTERAL No. 17-1410	Yadkin (16CVS531)	Reversed in part; vacated and remanded in part

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